CHAPTER ELEVEN

Standard of Review: Back to the Future?

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I. INTRODUCTION

When judges hear appeals from decisions made by other judges, their task is straightforward: ask whether the lower court got the answer "right" or "wrong." If the answer is "wrong," the appellate judges will substitute the "correct" answer. The scare quotes used here alert us to the unstated premise that there is always a single correct answer, and it consists of the one given by judges perched on the higher rung of the judicial ladder. Appellate courts will depart from the premise where they are called upon to review findings of fact. Here, higher courts may hesitate to intervene because they lack the trial judge's advantage of first-hand exposure to the evidence, especially *viva voce* testimony, and because revisiting factual determinations of little precedential value constitutes a poor use of judicial resources.

Judicial review of administrative action elicits a different set of questions that do not generally arise in ordinary appellate jurisprudence, and includes the following:

- Is there always a single correct answer?
- Who is better situated to determine the answer, the first-level specialist decision-maker or the generalist reviewing judge?
- What criteria can assist in determining who is better situated?
- What doctrinal consequences flow from that determination for judges tasked with reviewing administrative action?
- How do courts operationalize the doctrine in their review of administrative decisions?

The last of these questions is the subject of Chapter 12. This chapter tackles the remaining questions, and bundles them together under the rubric "choice of standard of review." The overarching dilemma concerns whether and why courts should defer to the decision of the original decision-maker, rather than just proceed under the traditional assumption that judges always know best. (It is not without significance that courts sometimes refer to administrative decision-makers as "inferior tribunals.")

Over the last 50 years, administrative law jurisprudence has grappled with standard of review. There have been pitched debates at the level of principle: what should the rules say about when, why, and how courts intervene in administrative decisions? Even if those questions are provisionally settled, considerable disagreement arises about practice—namely whether judges actually do what the rules they created say they should do. For instance, a judge may say she is deferring when it looks more like she is simply rubber-stamping. Or a judge may say he is deferring to the decision-maker when what he is really doing is endorsing a decision that conveniently happens to align with the result that the judge thinks is correct. A judge may say she is adopting a deferential posture, but the actual mechanics of the judicial review may show no actual respect for the original decision-maker's reasoning. These gambits are often difficult to detect, much less police, but they have a distorting impact on jurisprudence and make the quest for coherence in the case law a frustrating enterprise.

The following is a short and deceptively clear description of the current rules governing standard of review: A court that is called upon to review the interpretation or application of a statutory provision by an administrative decision-maker will usually (but not always) determine that the decision made by the agency, board, or tribunal that is assigned primary responsibility under the statute merits deference from the reviewing court. This means that

a court should hesitate to set aside the decision even if it might have arrived at a different result had it been the original decision-maker. In *Baker*, the Supreme Court of Canada endorsed David Dyzenhaus's articulation of deference as respect, stating, "Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision."[1]

Deference entails attaching weight to the fact that the administrative actor (and not the court) was delegated the initial task by the legislator and/or may be better qualified than a court to perform the task. We are familiar with this in our daily lives. We often defer to the opinion of a health professional (even in the face of private doubts) because we believe she has greater expertise than us; when we divide up labour for a group project, we generally refrain from interfering in our colleague's choice of how to complete his task (even if we disagree) because it's his job to do, not ours. Put differently, deference means that, in certain circumstances, the identity of the original decision-maker sways a court away from interfering with the decision, quite apart from whatever persuasive force the decision itself exerts.

In administrative law, a court will ask whether it should defer to the recommendations of an environmental review board regarding the construction of a pipeline, the appointment of labour arbitrators by a minister, a securities tribunal's interpretation of a limitation period in the *Securities Act*, or the exercise of humanitarian and compassionate discretion by an immigration officer. If the answer is yes, a court must then operationalize deference through a method of scrutiny that is somehow distinct from simply asking what outcome it would have reached had it been charged with making the original decision. And courts must do this across a vast range of subject areas, involving a staggering array of administrative actors, types of decisions, and affected interests.

In administrative law doctrine, the standard of review inquiry proceeds in two steps. First, should the court defer? Second, if the answer is yes, how does the court defer—how does a court *do* deference? If a court decides it need not defer, then it will judge the administrative decision on the basis of its correctness, and will set it aside if it disagrees with the decision-maker. If the court decides it ought to defer (which the Supreme Court of Canada currently thinks it should do in the overwhelming majority of cases), then a court will only set aside the original decision if it is unreasonable. For reasons that will be explained below, the label "correctness" is unfortunate, and should not be interpreted literally. Rather, a "correct" answer is best understood as the court's preferred outcome, where no credit or weight is given to the original decision-maker on the basis of the latter's competence or authority. Under the contemporary doctrine of standard of review, courts never completely relinquish their entitlement to have the last word, and so no decision can be completely immunized from judicial scrutiny. The issue is how closely and in what manner the decision will be scrutinized.

The remainder of this chapter provides a genealogy of standard of review. How did we get to where we are now and how does that path guide current doctrine? The jurisprudential history matters for several reasons. First, the underlying tensions around the rule of law, and the role of judicial review in the contemporary administrative state, are endemic and possibly intractable; it is important to be aware of how different doctrinal schema have

1 *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at para 65, 174 DLR (4th) 193 [*Baker*], quoting David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M Taggert, ed, *The Provinces of Administrative Law* (Oxford: Hart Publishing, 1997) 279 at 286; for the facts of *Baker*, see Kate Glover, Chapter 5, The Principles and Practices of Procedural Fairness.

grappled with them over time. Secondly, the past is never over in Supreme Court of Canada jurisprudence. Landmark cases seldom wipe the slate completely clean, and traces of past doctrines often linger or go dormant, only to reappear later. Understanding what the courts said in the past aids in understanding what they are saying now (and why). Thirdly, comparing past and present jurisprudence also illustrates an oscillation between two methodologies that pervade the common law: one, a defeasible rule (rule + exceptions) and the other, a multi-factorial balancing test. Appreciating the virtues and limitations of each in relation to standard of review offers an opportunity to consider more broadly the operation and effects of common law methodologies.

This chapter is best read as a very long introduction to the next chapter. But you should hesitate before skipping it. The jurisprudence is volatile, and the Supreme Court of Canada may yet hit the "reset" button again, as it did in 1979 (*CUPE v NB Liquor Corporation*),[2] 1998 (*Pushpanathan v Canada (Minister of Citizenship and Immigration)*),[3] and 2008 (*Dunsmuir v New Brunswick*).[4] At present, the standard of review is almost always "reasonableness," but the court has been reticent to provide guidance on how to apply this deferential standard across the wide range of situations that reviewing courts encounter. One resource for thinking about how to give context to the application of reasonableness under the current model is to look to past jurisprudence that formally addressed a different question (what is the standard of review?) but identified considerations that might be helpful to answering the current question (how does one defer in a given case?).

II. THE PREQUEL

In Chapter 1, A Historical Map for Administrative Law: There Be Dragons, Colleen M Flood and Jennifer Dolling surveyed the diverse reasons for the creation of administrative agencies, tribunals, and commissions. Certain functions—for example, licensing, distribution of goods or resources, and polycentric disputes—are ill-suited to resolution in a bipolar or adversarial judicial process. Some domains, such as engineering, the environment, securities, and telecommunications, require a level and type of technical or experiential expertise that judges lack. Other areas—for example, immigration, social assistance, and workers' compensation—generate a high volume of cases (usually involving people of limited means) that would overwhelm the ordinary courts and judicial processes. Concerns of efficiency, cost, and specialization militate in favour of an administrative regime. In the 20th century, ideological conflict between the expanding administrative state and the courts (incisively and passionately critiqued by the legal realists) led governments in the Anglo-American legal world to withdraw certain tasks from courts and allocate them to newly created, specialized agencies. The iconic case is labour law. Judicial deployment of traditional common law doctrines of freedom of contract, protection of private property, privity of contract, and prohibition on contracts in restraint of trade consistently thwarted legislation designed to provide a measure of protection to workers, standardize minimum terms

2 [1979] 2 SCR 227, 25 NBR (2d) 237 [*CUPE*].
3 [1998] 1 SCR 982, 160 DLR (4th) 193 [*Pushpanathan*].
4 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

of employment, and enable the emergence of an industrial relations regime based on union representation.

Frustrated with judicial hostility toward the objectives of labour relations legislation, the government not only established a parallel administrative regime of labour relations boards, but also enacted statutory provisions, known as privative or preclusive clauses, that purported to oust entirely judicial review of the legality of administrative action. Ordinarily, judicial review is available for breaches of procedural fairness, errors of law, abuse of discretion, or factual findings made in the absence of evidence.

So-called privative clauses were originally intended to prevent courts from interfering with substantive outcomes of administrative action through the doctrines of error of law or absence of evidence for findings of fact. A primary, but not exclusive, motive behind privative clauses was to direct the judiciary to respect the relative expertise of the administrative or regulatory body. Other reasons for privative clauses included the promotion of prompt and final resolution of disputes and the rationing of scarce judicial resources. Moreover, although the dominant narrative of the 20th century depicted a progressive administrative state using privative clauses to shield social welfare legislation from the conservative grasp of a retrograde judiciary, one should not assume that the politics of judicial review are uniform or static. In recent years, for example, the Australian government has perfected the use of the privative clause in the service of precluding judicial review of the interpretation and application of draconian legislation directed at asylum seekers.

Privative clauses vary in wording, but usually include a grant of exclusive jurisdiction over the subject matter, a declaration of finality with respect to the outcome, and a prohibition on any court proceedings to set the outcome aside. The following example from the Saskatchewan *Workers' Compensation Act, 1979* is typical:

> The board shall have exclusive jurisdiction to examine, hear and determine all matters and questions arising under this Act and any other matter in respect of which a power, authority or discretion is conferred upon the board … . The decision and finding of the board under this Act upon all questions of fact and law are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition, or other proceeding or removable by *certiorari* or otherwise in any court.[5]

The privative clause poses a conundrum for the traditional conception of the rule of law. On the one hand, a legislative grant of authority is always circumscribed by the terms of the statute. The common law presumes that citizens retain access to the ordinary courts in order to ensure that creatures of statute do not exceed or abuse the power granted to them. Making government actors accountable to the ordinary (and independent) courts is a principle that Dicey espoused as essential to the rule of law. As the British jurist HWR Wade wrote, the rule of law demands that "administrative agencies and tribunals must at all costs be prevented from being sole judges of the validity of their own acts."[6] As discussed below, the Supreme Court of Canada has even elevated judicial review to a constitutionally protected principle under s 96 of the *Constitution Act, 1867*.

5 *Workers' Compensation Act, 1979*, SS 1979, c W-17.1, s 22, quoted in *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890 at para 5 [*Pasiechnyk*].

6 HWR Wade, *Administrative Law*, 4th ed (Oxford: Clarendon Press, 1977).

On the other hand, the doctrine of parliamentary supremacy dictates that the legislator enacts the law, and the court must interpret and apply the law in accordance with the legislator's intent. A privative clause pits the second principle against the first by stating rather clearly and unambiguously that the legislator intends to oust the courts from supervising the actions of the administrative decision-maker.

Not surprisingly, judges historically resisted the privative clause's "plain meaning" and circumvented it through the following chain of reasoning, most powerfully articulated in the House of Lords' *Anisminic*[7] case: decision-makers' jurisdiction (authority to act) is demarcated by statute. This authority can be represented visually as a circle, where the line marks the boundary of the decision-maker's jurisdiction. Actions that exceed jurisdiction *purport* to be decisions or findings, but in actuality are nullities because they are not authorized by the statute. Therefore, "decisions" or "findings" that are insulated by a privative clause do not include actions that exceed the jurisdiction granted to the decision-maker.

If a college of physicians and surgeons purported to suspend the licence of a dentist to practise dentistry, we might all agree that the putative suspension was beyond the jurisdiction of the college and not protected by a privative clause. However, few real cases present such starkly deviant administrative behaviour. Typically, the issue is the interpretation of a statutory provision, inferences from evidence whose relevance to the outcome depends on a particular statutory construction, or the exercise of discretion. Judges faced with a privative clause assigned themselves the task of determining whether the issue fell "within jurisdiction" and, therefore, within the ambit of the privative clause or was a "jurisdictional question" that determined the outer boundary of the decision-maker's authority. In a case of the latter, a court was entitled to review the decision. At this juncture, and before the emergence of a variable standard of review, correctness was the implicit and exclusive standard of review. Rather like the early approach to natural justice, review in the face of a privative clause was an all-or-nothing affair; either the issue was a jurisdictional question, and the courts treated it as they would an issue on appeal, or it was virtually immunized from judicial oversight.

The effectiveness of privative clauses in deterring judicial intervention depended on the ease and frequency with which courts could designate an issue as determinative of jurisdiction, therefore warranting strict judicial scrutiny. Two techniques deployed by the courts were the "preliminary or collateral question" doctrine, and the "asking the wrong question" doctrine.

In the 1971 case of *Bell v Ontario (Human Rights Commission)*,[8] the Supreme Court of Canada considered the interpretation of s 3 of the Ontario *Human Rights Code*,[9] which, *inter alia*, proscribed discrimination on the basis of race in the provision of rental housing. The provision applied to rental of a "self-contained dwelling unit," and the landlord argued that the flat for rent in his house did not fall within the meaning of "self-contained dwelling unit." The landlord sought an order of prohibition to prevent the board of inquiry law professor Walter Tarnopolsky from investigating the complaint on the ground that the board had no jurisdiction under the *Human Rights Code* over the rental of his unit. The Supreme Court of Canada held that ascertaining the meaning of "self-contained dwelling unit" was

7 *Anisminic Ltd v Foreign Compensation Commission*, [1969] 2 AC 147 (HL).

8 [1971] SCR 756, rev'g *R v Tarnopolsky, Ex parte Bell*, [1970] 2 OR 672 (CA) [*Bell*].

9 RSO 1990, c H.19.

preliminary to the question of whether the landlord had engaged in discrimination contrary to the *Human Rights Code*. According to Martland J, the definition of "self-contained dwelling unit" was "an issue of law respecting the scope of the operation of the Act, and on the answer to that question depends the authority of the board to inquire into the complaint of discrimination at all … and a wrong decision on it would not enable the board to proceed further."[10] On the basis of the landlord's affidavit and photographs of his house, the majority of the court determined that the rental unit was not "self-contained." The landlord "was not compelled to await the decision of the board on that issue before seeking to have it determined in a court of law."[11] In so stating, the majority tacitly communicated that there could be no benefit in permitting the board of inquiry to first offer its own interpretation of "self-contained dwelling unit," and that the court could make its own determination based on looking at the blueprints of the house.

In *Metropolitan Life Insurance Company v International Union of Operating Engineers, Local 796*,[12] the Supreme Court of Canada addressed an Ontario Labour Relations Board certification of a union as the sole bargaining agent for a group of employees engaged in janitorial and building maintenance work. The union constitution provided for membership by "operating engineers" alone, but, in practice, the union had signed up workers from many occupational classifications. For almost two decades, the Ontario Labour Relations Board applied a policy of imposing a uniform set of criteria for determining whether employees were members of a union applicant for certification, where eligibility under the union constitution was only one factor and, even then, only an explicit constitutional exclusion from membership status (along with its rights and privileges) would be determinative. The board's reasons explained at length the rationale for its approach and specifically addressed why reliance on union constitutions as the determinant of union membership would produce incongruous outcomes and confer unfair advantages on some unions over others. The Ontario *Labour Relations Act*[13] contained a form of privative clause. The employer sought judicial review and ultimately appealed to the Supreme Court of Canada.

The court ruled that the determination by the board was not protected by the privative clause, because the board had "asked itself the wrong question." Although the question of whether enough employees were members of the union was undoubtedly an issue within the exclusive jurisdiction of the board, the board lost jurisdiction because it employed a faulty reasoning process. According to the court, "the Board [had] failed to deal with the question remitted to it (i.e. whether the employees in question were members of the union at the relevant date) and instead [had] decided a question which was not remitted to it (i.e., whether in regard to those employees there [had] been fulfillment of the conditions [for membership devised by the board])."[14] Implicit in the court's reasoning was the assumption that the union constitution was determinative of membership; indeed, the court did not engage at all with the rationale of the board in employing different criteria. The upshot of "asking the wrong question" was that even matters otherwise within the jurisdiction of a decision-maker (and thus protected by a privative clause) could become jurisdictional and

10 *Bell*, *supra* note 8 at para 775.
11 *Ibid* at para 769.
12 [1970] SCR 425 [*Metropolitan Life*].
13 SO 1995, c 1, Schedule A.
14 *Metropolitan Life*, *supra* note 12 at para 435.

subject to judicial scrutiny if the decision-maker engaged in a reasoning process that the court deemed defective.

The doctrines of "preliminary or collateral question" and "asking the wrong question" were derided by academic commentators as formalistic, malleable, and instrumental devices manufactured by the courts to meddle in spheres where the legislature had deliberately and explicitly excluded them. Courts inclined to disagree with a decision could, with little effort, transform almost any issue into a preliminary or collateral question, or depict the tribunal as asking the wrong question, in order to impugn a decision as the product of a flawed chain of reasoning.

The doctrines described above have largely been discarded, but the language of jurisdiction lives on. Familiarity with the jurisprudential history of privative clauses and jurisdiction remains important for two reasons. First, the sources of judicial anxiety about jurisdiction, rooted in the rule of law, remain salient. Second, it is arguable that traces of the "preliminary or collateral question" and "asking the wrong question" doctrines have been largely forgotten but have not disappeared entirely. For example, the assertion that a statutory provision is properly understood according to the principles of another area of law survives in the stricter scrutiny of legal questions deemed of "central importance to the legal system as a whole."[15] A reasoning process that inquires into the effect of a given interpretation on advancing the broader objectives of the statute may be rejected as a flawed and self-aggrandizing attempt to expand the jurisdiction of the decision-maker.[16]

III. THE BLOCKBUSTER: CUPE V NEW BRUNSWICK LIQUOR CORPORATION

CUPE v NB Liquor Corporation[17] is to the standard of review what *Nicholson*[18] is to procedure and *Baker* is to discretion: a judgment that shifted the legal landscape onto new terrain.[19] The facts are straightforward. A public sector union, Canadian Union of Public Employees (CUPE), went on strike. Under the terms of the New Brunswick *Public Service Labour Relations Act*,[20] striking employees were prohibited from picketing and employers were prohibited from using replacement workers. Section 102(3) of the Act stated:

> 102(3) … during the continuance of the strike
>
> (a) the employer shall not replace the striking employees or fill their position with any other employee, and
>
> (b) no employee shall picket, parade or in any manner demonstrate in or near any place of business of the employer.[21]

15 *Toronto (City) v CUPE, Local 79*, *infra* note 102 at para 62, LeBel J; see also *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 [*Bibeault*].

16 *Barrie Public Utilities v Canadian Cable Television Association*, 2003 SCC 28, [2003] 1 SCR 476 [*Barrie Utilities*].

17 *Supra* note 2.

18 *Nicholson v Haldimand-Norfolk (Regional) Police Commissioners*, [1979] 1 SCR 311 [*Nicholson*].

19 See Glover, *supra* note 1; Sheila Wildeman, Chapter 12, Making Sense of Reasonableness.

20 RSNB 1973, c P-25 [PSLRA].

21 PSLRA, s 102(3); *CUPE*, *supra* note 2 at para 4.

Section 101 of the Act contained a lengthy privative clause declaring, *inter alia*, that every "award, direction, decision, declaration, or ruling of the Board … is final and shall not be questioned or reviewed in any court."[22]

The employer complained to the NB Public Service Labour Relations Board that the union was picketing, contrary to s 102(3)(b), and the union complained that the employer was filling striking employees' positions with management personnel, contrary to s 102(3)(a). The board upheld the employer's complaint and ordered the union to cease and desist picketing. It also upheld the complaint against the employer and ordered it to refrain from using management personnel to do work ordinarily performed by bargaining unit employees. The employer successfully sought judicial review of the board's order against it and, eventually, the union appealed to the Supreme Court of Canada.

The issue in the case was the interpretation of s 102(3)(a). The employer argued that the provision should be interpreted to prohibit the temporary replacement of employees "with any other employee" or permanently filling their positions "with any other employee." Management personnel were not employees as defined in the Act, and therefore s 102(3)(a) was not breached by the use of management personnel to replace employees during the strike. The employer argued that the objective of the provision was to preserve the positions of the employees once the strike was over. The union argued that the phrase "with any other employee" only applied to permanently filling positions, and not to temporarily replacing employees during the strike.[23] Therefore, s 102(3) also precluded the temporary replacement of employees by management personnel.

Writing for the Supreme Court of Canada, Dickson J (as he then was) paraphrased the board's approach to interpreting s 102(3) as follows:

> It was the opinion of the board that when the Legislature saw fit to grant the right to strike to public employees, it intended through the enactment of s. 102(3) to restrict the possibility of picket-line violence by prohibiting strikebreaking, on the one hand, and picketing, on the other. This apparent intention, the board held, would be frustrated [by the employer's interpretation]. The result of such an interpretation would be that strikers would have been deprived of their right to picket, but the employer would not have been deprived of the right to employ strike-breakers.[24]

The court allowed the union's appeal. However, it did not follow the extant analytical framework toward the conclusion that the interpretation of s 102(3) was a question within the jurisdiction of the board and thus immunized from judicial review by the privative clause. Instead, Dickson J canvassed the reasons for the existence of privative clauses, emphasizing the legislative choice to confer certain tasks onto administrative actors, the specialized expertise and accumulated experience of administrative bodies, and the virtues of judicial restraint. In the case at bar, the interpretation of s 102(3) "would seem to lie logically at the heart of the specialized jurisdiction confided to the Board."[25] Consequently, a court should only interfere if (by labelling as jurisdictional error) an interpretation of the provision

22 PSLRA, s 101(1); *CUPE*, *supra* note 2 at para 14.
23 *CUPE*, *supra* note 2 at paras 5-6.
24 *Ibid* at para 7.
25 *Ibid* at para 15.

is "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation."[26]

The court's judgment in *CUPE* did not make a clean break with earlier jurisprudence that invoked jurisdictional error to circumvent privative clauses. Rather, it reconfigured the analysis of when, why, and how the doctrine of jurisdictional error ought to be deployed. Most importantly, it conveyed a spirit of curial deference, a recognition that administrative decision-makers are not merely "inferior tribunals" but specialized bodies that possess a legislative mandate to apply their expertise and experience to matters that they may be better suited to address than an "ordinary court." This change of heart regarding the appropriate role of judicial review eventually transcended the confines of privative clauses to encompass substantive judicial review in general, including the exercise of discretion.

A reading of *CUPE* reveals three sources of the Supreme Court of Canada's doctrinal change. First, the court situates the case in a broader reappraisal of the respective roles assigned by the legislature to the courts and to administrative bodies in the implementation of regulatory regimes.[27] According to Dickson J, courts should recognize and respect the fact that these specialized decision-makers bear primary responsibility for implementing their statutory mandate and may be better suited to the interpretive task than the generalist judge.

Second, the judgment candidly admits that, because the provision in dispute "bristles with ambiguities,"[28] no single interpretation could lay claim to being "correct." Instead, there were several plausible interpretations, including that of the board, the majority of the New Brunswick Court of Appeal, and a minority opinion of the Court of Appeal. Dickson J canvassed at length the basis for each possible interpretation, not in order to discern which one was correct, but to demonstrate why the board's interpretation "would seem at least as reasonable as the alternative interpretations suggested in the Court of Appeal" and, in any event, could not be described as patently unreasonable.[29] Although *CUPE* was concerned with a statutory provision whose ambiguity was attributable to poor drafting, it was amplified in subsequent cases, such as by Wilson J in *Corn Growers*[30] and L'Heureux-Dubé J in *Domtar*,[31] into a more radical critique of the conceit that there is always only one correct interpretation of a statutory provision. Ambiguity, gaps, silences, and contradictions can rarely (if ever) be completely excised from text. This ineluctable interpretive choice makes it possible to ask who is better placed to make the choice—the tribunal or the court? In other words, indeterminacy of meaning also underwrites the plea for judicial humility that is at the heart of *CUPE*. Moreover, Dickson J's interpretive survey notably focused on the meaning of the provision in the context of the statute, its purpose, and the consequences of various interpretive options for the fulfillment of the legislative scheme's objectives. He did not resort to dictionary definitions of "fill" or "replace," invoke common law presumptions about access to the courts, or employ mechanistic canons of statutory construction.

26 *Ibid* at para 16.
27 *Ibid* at para 15.
28 *Ibid* at para 4.
29 *Ibid* at para 29.
30 *National Corn Growers Assn v Canada (Import Tribunal)*, [1990] 2 SCR 1324 [*Corn Growers*].
31 *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 [*Domtar*].

Finally, Dickson J acknowledged the failure of prior judicial efforts to construct a coherent, principled means of distinguishing reviewable questions from those insulated by a privative clause. He noted that the "preliminary or collateral question" method is not helpful because one can, with little effort, characterize just about anything as preliminary or collateral. He admitted that identifying what is and is not jurisdictional can also be difficult, but counselled that "courts … should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so."[32] Unfortunately, the judgment did not offer any technique, except to suggest that "jurisdiction is, typically, to be determined at the outset of the inquiry"[33] and, in the case at bar, the board's statutory authority over the parties (in this case, the union and the employer) and the subject matter (the conduct of a lawful strike) indisputably conferred jurisdiction "in the narrow sense of authority to enter upon an inquiry."[34] The issue then became whether the board did "something which takes the exercise of its powers outside the protection of the privative or preclusive clause."[35] According to Dickson J, short of a patently unreasonable interpretation of a statutory provision, courts should not interfere with the result reached by the administrative decision-maker. The shorthand description of *CUPE*'s outcome is that a jurisdictional question is assessed according to a standard of "correctness," while questions within jurisdiction are evaluated against a standard of "patent unreasonableness."

CUPE destabilized the idea that statutory provisions have a single, correct meaning that judges are uniquely qualified to discern. Yet, labelling the non-deferential standard of review "correctness" seems to convey exactly the opposite message. Even if one rejects a thesis of radical indeterminacy of meaning in favour of the contention that some (or many) statutory provisions do have a single correct meaning, one cannot know prior to the interpretive exercise which provisions do and which do not have a single correct meaning. Yet, the choice of standard of review necessarily precedes that interpretive exercise. Recall that a standard of review analysis proceeds in two steps: first, choose the appropriate standard of review; second, apply it. Only after performing the second step can one form an opinion about whether there is a single "correct" meaning (and maybe not even then). That is why using the term "correctness" at the first step of a standard of review analysis is premature and misleading. The better view is that "correctness" as a standard of review means that the judge's task is to reach what she considers the optimal resolution of the issue, and the reasoning or outcome of the original decision-maker exerts no distinctive influence on how the judge performs that task. It is worth as little (or as much) as the opinion of a lawyer arguing the case, or an academic writing about the issue, or a court in another jurisdiction.

CUPE transformed the conceptual basis of substantive review through a reformulation of the institutional relationship between courts and the administrative state. As Dyzenhaus and Fox-Decent[36] observed, however, there is a certain irony in the fact that *CUPE* was decided only a year after *Nicholson*. The latter heralded a new era in procedural review by vastly expanding the range of administrative action subject to judicial scrutiny on grounds of

32 *CUPE*, *supra* note 2 at paras 9-10.
33 *Ibid* at para 9.
34 *Ibid* at para 12.
35 *Ibid* at para 16.
36 David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: Baker v Canada" (2001) 51 UTLJ 193.

procedural fairness. Meanwhile, *CUPE* signalled a radical break from the existing modes of substantive review by advocating judicial retreat from the interventionism of the past. Interestingly, both *Nicholson* and *CUPE* were and continue to be hailed by most commentators as progressive and forward-looking judgments.

IV. THE SEQUELS

A. The Retreat

In the aftermath of *CUPE*, many provincial superior courts embraced the message of curial deference, although the Supreme Court of Canada itself displayed more diffidence. One indication was a line of cases that endowed judicial review with constitutional protection under s 96 of the *Constitution Act, 1867*.[37] This meant that no privative clause, no matter how carefully drafted, could entirely insulate an administrative decision from judicial review.[38] In terms of the rule of law tension between fidelity to parliamentary intent and the common law presumption of access to the ordinary courts, the court's expansive interpretation of s 96 of the *Constitution Act, 1867* ensures that the latter trumps the former.[39]

Another sign of retrenchment was the disregard of Dickson J's admonition against labelling issues as jurisdictional in order to subject them to the more stringent correctness review.[40] The Supreme Court of Canada post-*CUPE* showed no reluctance in labelling issues as jurisdictional, even (or especially) in labour law. The absence of methodological guidance about how to identify "jurisdictional" questions stoked a certain skepticism that the court

37 (UK), 30 & 31 Vict, c 3. Section 96 grants jurisdiction over the appointment of superior court judges to the federal government, but has been interpreted to protect "essential" judicial functions associated with superior court judges.

38 *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220; *Bibeault*, *supra* note 15; *Pasiechnyk*, *supra* note 5; *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369 [*Royal Oak*].

39 The court's devotion to the primacy of access to the ordinary courts remains to be tested where courts themselves (rather than the legislature) police access to first-level judicial review. As we have seen in *Baker* and will see in *Pushpanathan*, below, the *Immigration and Refugee Protection Act* imposes a written leave requirement on first-level judicial review. Whereas legislatures purport to limit access to judicial review via a privative clause, a leave requirement endows Federal Court judges with authority to restrict access to judicial review by denying leave. The jurisprudence indicates that the threshold for leave is low and ought to be granted where the applicant makes "an arguable case," and denied only where it is "plain and obvious that the applicant would have no reasonable chance of succeeding." Apart from descriptions of a quantitative threshold, there are no discernible qualitative criteria, no reasons requirement, and no appeal from a denial of leave. In practice, about 85 percent of applications for leave to seek judicial review of refugee decisions are denied, although there is radical variation in grant rates between judges. One might contend that judicial consideration of a leave application constitutes a perfunctory form of access to the ordinary courts, but the fact that the leave process operates in an opaque and unaccountable manner makes this characterization difficult to defend from a rule of law perspective. See Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 Queens LJ 1.

40 See e.g. *L'Acadie* (*Syndicat des employés de production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879. Elsewhere in the jurisprudence, when addressing the capacity of tribunals to entertain Charter challenges to their constitutive statute, the Supreme Court of Canada described tribunal "jurisdiction over the whole of the matter" as jurisdiction over parties, subject matter, and remedy: *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5 at para 12.

was reverting to a result-oriented analysis driven by agreement or disagreement with the ultimate outcome.

From *Bibeault*[41] onwards, the Supreme Court of Canada attempted to develop and refine a test for distinguishing a jurisdictional question (subject to correctness) and those falling within a tribunal's jurisdiction (subject to patent unreasonableness). Beetz J's innovation was to propose what he called a "pragmatic and functional" analysis for distinguishing between jurisdictional and non-jurisdiction-conferring provisions. The central question posed by the analysis was not whether a question was preliminary or collateral, but whether "the legislator [intended] the question to be within the jurisdiction conferred on the tribunal."[42]

Responding to this question involved an examination not only of "the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reasons for its existence, the area of expertise of its members and the nature of the problem before the tribunal."[43] By framing the question in terms of legislative intent, and by requiring a privative clause in order to trigger a departure from the usual approach to judicial review, Beetz J retained a formal commitment to parliamentary supremacy. He also invoked the expertise of the tribunal as a relevant factor in the analysis, which hearkened back to *CUPE*'s plea for judicial humility in relation to so-called "inferior tribunals." Nevertheless, in his application of the criteria, Beetz J swiftly concluded that the issue before the court was indeed a jurisdictional question that the commissioner failed to answer correctly.[44]

B. The Advance

The Supreme Court of Canada demonstrated its most enthusiastic endorsement of *CUPE* by making "should the court defer?" a question asked not only where statutes contain privative clauses, but also where statutes contain finality clauses,[45] or leave intact the option of judicial review, or even provide a full appeal to the courts on questions of law and fact.

Pezim v British Columbia (Superintendent of Brokers)[46] is noteworthy because the issue concerned a question of law and the enabling statute provided for a right of appeal to a court. Writing for the court, Iacobucci J's judgment offers a time-lapse photograph of the rapid shift in the jurisprudence from the language of "jurisdiction" and "privative clause" to "expertise" and "deference."[47] The issue was whether newly acquired information about asset value constituted a "material change" requiring disclosure by a reporting issuer. At the outset of his review of principles of judicial review, Iacobucci J hewed closely to *Bibeault*, and stated:

> The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. … Included in the analysis is an examination

41 *Supra* note 15.

42 *Ibid* at para 120.

43 *Ibid* at para 123.

44 But compare *Ivanhoe Inc v UFCW, Local 500*, 2001 SCC 47, [2001] 2 SCR 565 [*Ivanhoe*], where the court adopted a standard of patent unreasonableness for the interpretation of the same phrase in a slightly revised statute.

45 A finality clause typically states that the decision of the agency is final and binding on the parties, but the clause says nothing about judicial review.

46 [1994] 2 SCR 557 [*Pezim*].

47 See also *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748 at para 31, 144 DLR (4th) 1 [*Southam*]: "There is no privative clause, and so jurisdiction is not at issue."

> of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance is whether or not the question goes to the jurisdiction of the tribunal involved.[48]

A few paragraphs later, Iacobucci J declared that "even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise."[49]

The presence of a privative clause was apparently not so crucial after all, and the fundamentally important "jurisdictional question" was supplanted by "expertise" as the key determinant of standard of review.[50]

In *Pezim*, there was no doubt that the BC Securities Commission had jurisdiction over the parties (members of the board of directors of reporting issuers on the Vancouver Stock Exchange), the subject matter (disclosure of material change), and the remedy (suspension of trading). The court identified several factors that contributed to the conclusion that the BC Securities Commission was a highly specialized tribunal and that an interpretation of material change in the BC *Securities Act*[51] "arguably goes to the core of its regulatory mandate and expertise" in regulating the securities market in the public interest.[52]

Although the court concluded that the interpretation of the statutory provision warranted curial deference, it conspicuously failed to describe the applicable standard of review as "patently unreasonable." Instead, Iacobucci J simply adverted to the need for considerable deference. Three years later, in *Canada (Director of Investigation and Research) v Southam Inc*,[53] Iacobucci J made explicit what he had only hinted at in *Pezim*—namely, an intermediate standard of review between patent unreasonableness and correctness. He labelled the standard "reasonableness *simpliciter*" and declared it (retrospectively) as the standard of review applied in *Pezim*. To understand how the perceived need for a "middle ground" emerged, one must return to *Pezim*'s shift in emphasis from privative clauses to relative expertise. A binary focus on the presence or absence of a privative clause (and the attendant jurisdictional/non-jurisdictional question) aligns with two standards of review embodying the presence or absence of deference. Shifting to an emphasis on relative expertise does not map easily onto a dichotomy, which may help to explain the impetus driving the court to insert reasonableness *simpliciter* into the spectrum.

Southam concerned a finding by the Competition Tribunal that Southam's acquisition of various newspapers within a given advertising market substantially lessened competition. By way of remedy, the tribunal gave Southam the option of divesting itself of one of two community papers. The relevant statute provided for an appeal directly to the Federal Court of Appeal. Two aspects of the tribunal's decision were the subject of appeal to the Supreme Court of Canada: the dimensions of the relevant market within which to assess impact on competition and the remedy of divestment.

48 *Pezim*, *supra* note 46 at paras 589-90.
49 *Ibid* at para 591.
50 See also *United Brotherhood of Carpenters and Joiners of America, Local 579 v Bradco Construction Ltd*, [1993] 2 SCR 316.
51 SBC 1985, c 83.
52 *Pezim*, *supra* note 46 at para 591.
53 *Southam*, *supra* note 47.

After reviewing various factors pertinent to the standard of review, Iacobucci J concluded that some factors pointed toward deference and some away from it:

> Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the *Competition Act* is broadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.[54]

The new middle ground was reasonableness *simpliciter*: "an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination." This examination entails an inquiry into the "evidentiary foundation or the logical process by which conclusions are sought to be drawn from it."[55] Although Iacobucci J was not entirely clear on this point, he seems to have regarded the most deferential standard of patent unreasonableness as appropriate only in the presence of a privative clause, where intervention must formally be justified by resort to the concept of jurisdiction.

The insertion of an intermediate standard of review did little to promote predictability or determinacy in this area of administrative law. Moreover, some contended that if three standards were better than two, four standards must be better than three, five better than four, and so on. Others suggested that standard of review should be conceptualized as a spectrum—sometimes closer to correctness, sometimes closer to patent unreasonableness—depending on the balance of factors for and against deference in the particular case. The Supreme Court of Canada squelched both propositions in *Law Society of New Brunswick v Ryan*[56] and stood firm on three standards of review rather than a spectrum.

V. PRAGMATIC AND FUNCTIONAL REDUX: PUSHPANATHAN V CANADA

Shortly after *Southam*, the Supreme Court of Canada took the opportunity to consolidate and summarize the factors to be taken into account in determining the appropriate standard of review. *Pushpanathan*[57] concerned the interpretation of a provision in the *Immigration Act*[58] (incorporating art 1F(c) of the UN Convention Relating to the Status of Refugees) that excludes from refugee status those persons "guilty of acts contrary to the purposes and principles of the United Nations." Pushpanathan had made a refugee claim in Canada. Before his claim was heard, he was convicted in Canada of the offence of conspiracy to traffic narcotics. He was subsequently excluded from refugee protection under art 1F(c) on the basis

54 *Southam*, *supra* note 47 at para 54.
55 *Ibid* at para 56.
56 2003 SCC 20, [2003] 1 SCR 247 [*Ryan*].
57 *Supra* note 3.
58 *Immigration Act*, RSC 1985, c I-2.

of his conviction. The issue in the case concerned whether "acts contrary to the purposes and principles of the United Nations" included a criminal conviction for drug trafficking in the country of asylum.[59] A distinctive feature of the *Immigration Act* (also applicable in *Baker*) was the mechanism for judicial review. The statute contained no privative clause or right of appeal. Instead, judicial review could only commence with leave of a judge of the Federal Court, and no reasons were required where leave was denied. If leave was granted and the case heard, the losing party could only appeal to the Federal Court of Appeal if the trial judge certified "a serious question of general importance."

Writing for the court, Bastarache J reformulated *Bibeault*'s pragmatic and functional question "Did the legislator intend this to be within the tribunal's jurisdiction?" into "Did the legislator intend this question to attract judicial deference?" The significance of this semantic shift was to regard a jurisdictional question as equivalent to a question to which no deference was owed, which would be determined through the pragmatic and functional analysis. He organized the factors relevant to discerning this legislative intent into four categories: (1) privative clause, (2) expertise, (3) purpose of the act as a whole and of the provision in particular, and (4) nature of the problem (question of law, fact, or mixed law and fact). Jurisprudence after *Pushpanathan* routinely relied on these four categories. The *Dunsmuir* decision, discussed below, does not completely reject *Pushpanathan*, but post-*Dunsmuir* judgments have tended to write *Pushpanathan* out of the story. Whether that will continue remains unclear.

Although the *Pushpanathan* court identified four separate factors, there are arguably only two ingredients in the deference calculus: the legislator's direct or indirect pronouncement about judicial supervision (privative clause, finality clause, common law judicial review, statutory judicial review, appeal) and the reviewing court's assessment of the agency's relative expertise. The inquiry into statutory purpose and the nature of the problem seem to address specific indicia of expertise. In *Pushpanathan* itself, the court admitted that "purpose and expertise often overlap,"[60] and that the rationale for greater scrutiny of general questions of law than questions of fact relates to the relative expertise of courts versus agencies.[61] A year after *Pushpanathan*, *Baker* expanded the reach of the standard of review inquiry to encompass judicial review of discretion, as well as questions of fact, mixed fact and law, and law. The outcome of the pragmatic and functional test would direct a reviewing court to the appropriate stance toward the substantive fairness of the decision before it: don't defer (correctness); defer a little (reasonableness *simpliciter*); defer a lot (patent unreasonableness).

The following survey summarizes the meaning ascribed to the four elements of the *Pushpanathan* test and provides examples of their application in various cases, bearing in mind the substantial overlap just described.

A. Privative Clause

Pushpanathan furthered the project of detaching the rationale of deference from privative clauses. By the time the court reached *Pushpanathan*, the formal category of "jurisdiction" had been hollowed out: "a question which 'goes to jurisdiction' is simply descriptive of a

59 *Pushpanathan*, *supra* note 3 at para 22.
60 *Ibid* at para 36.
61 *Ibid* at para 37.

provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis."[62]

Privative clauses are not all identical, though the differences between them can be overstated by courts. In any event, as La Forest J unhelpfully stated in *Ross v New Brunswick School District No 15*, "there are privative clauses and there are privative clauses."[63]

Under the pragmatic and functional test, the presence of a privative clause weighed in favour of curial deference. It never played a determinative role, however. The court often said that lack of expertise could outweigh a privative clause; the court never said that a privative clause could outweigh the court's estimation of the decision-maker's relative lack of expertise.

B. Expertise

The case law was clear that relative expertise was the most important factor in determining the standard of review. In *Pushpanathan*, the court identified three steps in evaluating expertise: "the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise."[64] Where the tribunal possesses "broad relative expertise" that it brings to bear "in some degree" on the interpretation of highly general questions, the court would show considerable deference, despite the generality of the issue.[65] Such was the case in *Southam* ("material change") and *Corn Growers* (interpretation of a treaty provision), where the court applied the standard of patent unreasonableness in view of the tribunal's specialized expertise. In *Southam*, Iacobucci J described the objectives of the *Competition Act* as more economic than "strictly legal." Business people and economists possess greater expertise than a "typical judge," who is more "likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently … less able to secure the fulfillment of the purpose of the *Competition Act* than is the Tribunal."[66] This judicial modesty in relation to certain regulatory domains was presaged in an earlier concurring judgment of L'Heureux-Dubé J in *Corn Growers*, where she identified "labour relations, telecommunications, financial markets and international economic relations" as examples where courts "may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power."[67]

Unfortunately, the case law provided scant guidance on when the court would valorize the agency's expertise as relevant to the interpretation of a question of law and when it would discount it. When describing the broad expertise of an agency, the Supreme Court of Canada attended to the agency's composition and specialized knowledge in comparison to a court. Evidence of distinctive expertise could come from statutory criteria for appointment

62 *Ibid* at para 28.
63 [1996] 1 SCR 825 at para 26.
64 *Pushpanathan*, *supra* note 3 at para 33.
65 *Ibid* at para 34.
66 *Southam*, *supra* note 47 at para 49.
67 *Corn Growers*, *supra* note 30 at para 80.

(for example, non-legal qualifications, length of term, and security of tenure), a policy-making function, or a "non-judicial means of implementing the Act."[68]

Bodies that deal with economic, financial, or technical matters seem to sit at the apex of the court's estimation of expertise. Members of securities commissions, international trade tribunals, and telecommunications bodies have all been recognized by the court as possessing experience, expertise, and specialized knowledge that courts lack.

Labour boards, often protected by privative clauses, are in some ways the paradigmatic example of expert administrative tribunals. Indeed, the Supreme Court of Canada would typically acknowledge their specialized knowledge and expertise in relation to industrial relations.[69] Yet labour boards tend not to benefit as consistently from curial deference as some other bodies. Labour arbitrators are considered less expert than labour boards (even though the same people often engage in both decision-making activities), because arbitrators are usually appointed by the parties on an ad hoc basis, and the arbitrator's task is confined to the interpretation and application of a particular collective agreement, rather than administration of the entire regime of industrial relations.[70] The ad hoc nature of the appointment usually counts against the expertise of certain human rights tribunals as well. More generally, the majority of the Supreme Court of Canada consistently deprecated the expertise of human rights tribunals and commissions, which they confined to fact-finding in the human rights context. The divergent judgments of La Forest J (concurring) and L'Heureux-Dubé J (dissenting) in *Canada (Attorney General) v Mossop*[71] vividly illustrate this point.

To the extent that expertise was the animating principle of the pragmatic and functional test, it is perhaps unsurprising that the court resisted deferring to human rights tribunals. Rights adjudication lies at the heart of the judicial function and institutional self-understanding. The court has found it difficult to concede anything but a narrow compass of relative expertise to another body charged with tasks that so closely resemble its own.

On the other hand, in both *Ryan*,[72] a case involving the sanction for misconduct imposed on a miscreant lawyer, and *Moreau-Bérubé v New Brunswick (Judicial Council)*,[73] involving allegations of judicial misconduct, the court went to some length to defend the superior expertise of professional discipline committees composed of lawyers and judges. Unlike a securities commission or a competition tribunal, the expertise of a law society or judicial council discipline committee could hardly be described as beyond the ken of most judges. Nevertheless, the *Ryan* majority explained that practising lawyers "may be more intimately acquainted with the ways that these [professional] standards play out in the everyday practice of law than judges who no longer take part in the solicitor–client relationship."[74] To the extent that at least one member of the committee was a layperson, the fact that the member was not a lawyer could even place him or her "in a better position to understand how par-

68 *Ibid* at para 32.

69 See e.g. *Canada (Attorney General) v Public Service Alliance of Canada*, [1993] 1 SCR 941; *Ivanhoe*, *supra* note 44; *Royal Oak*, *supra* note 38; *Toronto (City) Board of Education v OSSTF, District 15*, [1997] 1 SCR 487.

70 See e.g. *Dayco (Canada) Ltd v CAW-Canada*, [1993] 2 SCR 230.

71 [1993] 1 SCR 554 [*Mossop*].

72 *Supra* note 56.

73 2002 SCC 11, [2002] 1 SCR 249 [*Moreau-Bérubé*].

74 *Supra* note 56 at para 31.

ticular forms of conduct and choice of sanctions would affect the general public's perception of the profession and confidence in the administration of justice."[75] Ultimately, "owing to its composition and its familiarity with the particular issue of imposing a sanction for professional misconduct in a variety of settings, the Discipline Committee arguably has more expertise than courts on the sanction to apply to the misconduct."[76] As for the New Brunswick Judicial Council, Arbour J concluded that a "council composed primarily of judges, alive to the delicate balance between judicial independence and judicial integrity, must … attract in general a high degree of deference."[77] The court eventually decided on the intermediate standard of reasonableness in both cases.

Decision-making bodies staffed by elected officials have proven problematic subjects for the evaluation of expertise (and for the application of the pragmatic and functional test as a whole). In *Baker*, the court dealt with the humanitarian and compassionate discretion that was statutorily conferred on the minister of citizenship and immigration, but delegated to a civil servant. The court found that the "fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply."[78]

In *Chamberlain v Surrey School District No 36*,[79] a local school board composed of elected trustees passed a resolution against authorizing three books depicting same-sex-parented families to be used in the classroom. One challenge to the resolution was that the board acted outside its mandate under the *School Act*[80] in passing the resolution—that is, it exceeded its jurisdiction. The majority of the court applied the pragmatic and functional test to arrive at a reasonableness standard of review, and found the resolution unreasonable. Writing for the majority, McLachlin CJ described the board as expert in balancing "the interests of different groups, such as parents with widely differing moral outlooks, and children from many types of families," and acknowledged that, as locally elected representatives, the board is better placed to understand community concerns than the court."[81] However, McLachlin CJ went on to find that, because the decision in question "has a human rights dimension" in which courts are more expert than administrative bodies, less deference is owed. Writing in dissent, Gonthier J commented that, although the board's decision clearly had a human rights aspect, "courts should be reluctant to assume that they possess greater expertise than administrative decision-makers with respect to all questions having a human rights component,"[82] especially in the context of local democracy. LeBel J's dissent challenged the premise that expertise ought to be the basis of curial deference toward elected officials in their legislative (as opposed to adjudicative) capacity. He noted that, in judicial review of municipal actors, "our court has always focused on whether the action in question

75 *Ibid* at para 32.
76 *Ibid* at para 34.
77 *Moreau-Bérubé*, *supra* note 73 at para 60.
78 *Baker*, *supra* note 1 at para 59.
79 2002 SCC 86, [2002] 4 SCR 710 [*Chamberlain*].
80 RSBC 1996, c 412.
81 *Chamberlain*, *supra* note 79 at para 10.
82 *Ibid* at para 143.

was authorized, not on whether it was reasonable."[83] In LeBel J's view, the animating principle is the separation of the judiciary and representative government and the need to protect each from illegitimate interference by the other. Application of the pragmatic and functional test, with the possible result of a reasonableness standard,

> fails to give due recognition to the board's role as a local government body accountable to the electorate. As long as it acts pursuant to its statutory powers, it is carrying out the will of the community it serves and in general is answerable to the community, not the courts. But if it purports to exercise powers it does not have, its actions are invalid.[84]

One way of understanding LeBel J's position is to posit that elected officials merit deference because they represent the will of the majority, not because of any expertise they may possess. The *ultra vires–intra vires* dichotomy (familiar from division of powers jurisprudence) is analogous to the inside–outside jurisdiction dichotomy, but is even more deferential to matters deemed *intra vires*. In certain respects, the disagreement between the majority and LeBel J on this issue mirrors a similar debate about the application of the doctrine of reasonable apprehension of bias. It brings to the surface the recurring dilemma about when elected officials should be held accountable through judicial review versus the ballot box.

Although the Supreme Court of Canada prioritized expertise in formulating the standard of review, its inquiry was limited to the statutory role of the administrative actor, not to the particular individual occupying it. Courts gleaned evidence of expertise from statute and surrounding context, but did not scrutinize the qualifications, competence, training, or experience of a specific decision-maker. Administrative law does not provide a mechanism for directly imposing on the state an obligation to adopt a merit-based appointment process for non-elected decision-makers. Consider the *Back to School Act, 2001* (Toronto and Windsor),[85] wherein the statute empowered the minister of labour to appoint as arbitrator a person who "has no previous experience as an arbitrator" and who is not "mutually acceptable to both trade unions and employers."[86] Even the doctrine of independence of decision-makers adopts narrow and formal criteria for assessing independence from inappropriate government influence on decision-makers. In other words, independence identifies formal indicia of susceptibility to government influence, and standard of review evaluates the presence or absence of expertise according to different formal criteria, but neither body of law requires or promotes actual expertise. One might consider whether merit and competence ought to matter to courts and, if so, how these concerns could be addressed in administrative law doctrine.[87]

C. Purpose of the Statute as a Whole and the Provision in Particular

What aspect of statutory purpose is relevant to the standard of review? In *Pushpanathan*, the court distilled prior jurisprudence into the following proposition: where the statute or provision can be described as "polycentric"—that is, engages a balancing of multiple interests,

83 *Ibid* at para 197.
84 *Ibid* at para 201.
85 SO 2001, c 1, cited in *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539 at para 81 [*Retired Judges*]. Note: This Act was repealed on December 15, 2009 (SO 2009, c 33, Schedule 20, ss 5(1), 6).
86 *Back to School Act, 2001*, s 11(4).
87 *Retired Judges*, *supra* note 85.

constituencies, and factors or contains a significant policy element, or articulates the legal standards in vague or open-textured language—more judicial restraint is warranted. Disputes that more closely resemble the bipolar, adversarial model of opposition between discrete parties and interests attract less curial deference. The rationale is that judges have less relative expertise in the former and more relative expertise in the latter. When discretion was added to the mix of provisions subject to review, courts tended to regard discretion-granting provisions as polycentric insofar as the exercise of discretion engaged the consideration of multiple factors. Note, however, that discretionary decisions (such as the humanitarian and compassionate decision in *Baker*) may directly affect only a single individual or identifiable group of individuals, in contrast to the more diffuse benefits and burdens associated with conventional "polycentric" provisions. Courts have also identified provisions that confer positive discretion (a beneficial exemption from a rule) as attracting more deference than negative discretion.

D. The Nature of the Problem

Appellate and judicial review jurisprudence have long divided legal issues into questions of law, questions of mixed law and fact, and questions of fact. In administrative law, these conveniently map onto the spectrum of deference as less deference, neutral, and more deference, in accordance with courts' declining relative expertise: "without an implied or express legislative intent to the contrary … legislatures should be assumed to have left highly generalized propositions of law to courts."[88]

The characterization of a matter as a question of law or as a question of mixed law and fact may not be straightforward.[89] It is complicated by the fact that identifying an issue as a question of law does not necessarily preclude the possibility that the tribunal may possess greater expertise than a court in interpreting it, especially if the court otherwise regards the agency as highly expert, and the legal question involves interpretation of a provision in the agency's enabling statute.[90]

One clue that judges have looked for in distinguishing legal questions confided to the tribunal from those better resolved by the courts is the extent to which the determination will have precedential value in subsequent cases. The greater the precedential impact, the greater the assessment of expertise tilted toward the courts. Labelling the issue as a "pure" question of law (*Barrie Utilities*),[91] a "concept derived from the common law or Civil Code" (*Bibeault*),[92] a general question of law (*Mossop*),[93] not scientific or technical (*Mattel*),[94] or a human rights issue (*Pushpanathan*[95] *Chamberlain*[96]) was usually a reliable signal that the Supreme Court of Canada had concluded that the legal issue was one in which it believed itself to have superior expertise. In *Pushpanathan*, the court relied on the unique provision

88 *Ibid* at para 38.
89 *Southam*, *supra* note 47 at paras 34-35.
90 See *Retired Judges*, *supra* note 85.
91 *Supra* note 16.
92 *Supra* note 15.
93 *Supra* note 71.
94 *Mattel Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 [*Mattel*].
95 *Supra* note 3.
96 *Supra* note 79.

in the *Immigration Act* (now the *Immigration and Refugee Protection Act*)[97] whereby a Federal Court judge must certify a "serious question of general importance"[98] in order for the litigants to proceed to the Federal Court of Appeal. The statutory requirement of generality and serious importance (as determined by the Federal Court judge) allowed the court to declare that "s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words 'a serious question of *general* importance.'"[99]

In *Baker*, decided a year later, the court reiterated that s 83(1) inclined away from deference, but quickly added that "this is only one of the factors involved in determining the standard of review."[100] Indeed, the Supreme Court of Canada in *Baker* also held that once leave to appeal was granted, appellate courts were not restricted to the certified question. In *Baker* itself, the court addressed only obliquely the question identified by the Federal Court as a "serious question of general importance," even though the *Pushpanathan* court regarded the certified question provision as virtually irreconcilable with deference. Instead, the fact that the decision in *Baker* was discretionary seemed to exert the most significant influence in favour of deference. The court ultimately arrived at the intermediate standard of reasonableness *simpliciter*.[101]

VI. DUNSMUIR: AND THEN THERE WERE TWO

Ever since *Southam* ushered in the intermediate standard of review—reasonableness *simpliciter*—commentators, practitioners, and even some lower court judges complained about the indeterminacy, impracticability, unpredictability, and sheer confusion generated by three standards of review. The balancing test for determining which of three standards of review should apply often produced indicators pointing both toward and away from deference, thereby failing to provide predictable or reliable guidance to lawyers and litigants. Identifying criteria to distinguish the merely "unreasonable" from the "patently unreasonable" decision proved frustrating and elusive. In short, the "pragmatic and functional" test was neither.

In his concurring judgment in *Toronto (City) v CUPE, Local 79*,[102] LeBel J canvassed the widespread discontent with the direction of Supreme Court of Canada jurisprudence. He provided a thorough and thoughtful analysis of the sordid history of the rise and application of three standards and issued a plea for the abandonment of three standards in favour of a

97 SC 2001, c 27.

98 *Pushpanathan*, *supra* note 3 at para 87 (*Immigration Act*, s 83(1); *Immigration and Refugee Protection Act*, s 82.3).

99 *Pushpanathan, supra* note 3 at para 43 (emphasis added by the court).

100 *Baker*, *supra* note 1 at para 58.

101 The court in *Baker* also undercut the logic of its own reasoning in *Pushpanathan* regarding s 83(1). In *Baker*, *supra* note 1, the court ruled that, once a question was "certified," the Federal Court of Appeal (and, *a fortiori*, the Supreme Court of Canada) was free to consider any other issue that was apposite to the disposition of the case, without filtering it through the s 83(1) criterion of "serious question of general importance."

102 2003 SCC 63, [2003] 3 SCR 77 [*Toronto v CUPE*].

return to "a two standard system of review, correctness and a revised unified standard of reasonableness."[103]

Five years later, the *Dunsmuir* case gave the court the occasion to heed LeBel J's *cri de coeur*.[104] Like *CUPE*, *Dunsmuir* arose out of New Brunswick, involved employment, and featured confounding statutory text.

Mr Dunsmuir was dismissed from his civil service position in the Department of Justice. He received severance, but insisted that he was also owed a duty of fairness prior to termination. He grieved unsuccessfully, and then appealed to an adjudicator. (The procedural fairness aspects of the case are discussed by Kate Glover in Chapter 5, The Principles and Practices of Procedural Fairness.) The adjudicator appointed to address Mr Dunsmuir's grievance interpreted the relevant statutory provisions in a manner that allowed him to consider the reasons for discharge, even though the employer did not assert that Mr Dunsmuir was dismissed for cause. The question of law was whether the adjudicator was entitled to inquire into whether the employer actually dismissed Mr Dunsmuir for cause and, by extension, whether just cause existed. The adjudicator determined that the statute authorized him to inquire into the reasons for discharge as part of the grievance arbitration, but then went on to find that the dismissal was, on the facts, not for cause. One issue before the Supreme Court of Canada was the appropriate standard of review for the question of law concerning the adjudicator's authority to inquire into the reasons for dismissal.

The *Dunsmuir* majority acknowledged that its pragmatic and functional approach had attracted criticism for its "theoretical and practical difficulties" and that it had "proven difficult to implement." Binnie J, concurring, described it less charitably as "distracting" and "unproductive."

Despite the deficiencies of past jurisprudence, the court did not resile from its post-*CUPE* endorsement of deference as an animating principle of substantive judicial review. En route to introducing the new standard of review analysis, the majority rehearsed the rationale for deference:

> Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime."[105] In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.[106]

For the court, the problem lay not in the concept of deference or its virtues, but in the challenge of putting it into operation. After surveying the evolution of judicial review over the past 50 years, the majority offered the following diagnosis:

103 *Ibid* at para 134.

104 *Supra* note 4.

105 DJ Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004) 17 Can J Admin L & Prac 59 at 93.

106 *Dunsmuir*, *supra* note 4 at para 49.

> The court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.[107]

The Supreme Court of Canada followed the lead of LeBel J and walked the legal test back from three to two standards of review—correctness and reasonableness. It rebranded the pragmatic and functional test as the standard of review analysis. It also adopted a different methodology for choosing between correctness and reasonableness.

The pragmatic and functional test, as synopsized in *Pushpanathan* and applied thereafter, laid out four factors to be evaluated and weighed. Although the *Dunsmuir* judgment is not without ambiguity, the pattern of subsequent jurisprudence thus far suggests that the new standard of review methodology is no longer a balancing test, but more closely resembles a defeasible rule: the default position is deference, unless one of the exceptions applies.

The court began by casting the net of deference widely over a range of issues and situations: "Where the question is one of fact, discretion or policy, deference will usually apply automatically. We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated."[108] The majority explained that the court ought to defer to the interpretation of a "discrete and special administrative regime in which the decision maker has special expertise."[109] On the basis of the pattern of past jurisprudence, the court anticipated that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity."[110] Deference will even be warranted "where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context."[111] The majority paused to genuflect briefly before the privative clause, acknowledging it as "a statutory direction from Parliament or a legislature indicating the need for deference."[112]

Given all the situations that incline toward deference, when is deference not warranted? The majority stated that a standard of correctness would apply to:

1. a question of law "of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise";[113]

107 *Ibid* at para 43.

108 *Ibid* at para 53. As Paul Daly wryly notes, "It is worth pausing for a moment to consider the linguistic wonder that is 'the thing that usually happens automatically.' A sliding door that 'usually opens automatically' is likely to lead to puzzled pedestrians at best and bruised noses at worst. A company which 'usually deposits paychecks automatically' is unlikely to gain the trust of its employees. … At the same time as it purported to establish presumptive categories to which either reasonableness or correctness would appropriately be applied, … [the *Dunsmuir* court] gave no guidance as to when the presumptions would be rebutted or displaced, or what weight the presumptions should be given": Paul Daly, "The Unfortunate Triumph of Form Over Substance in Canadian Administrative Law"(2012) 50 Osgoode Hall LJ 317 at 326-27.

109 *Dunsmuir, supra* note 4 at para 54.

110 *Ibid*.

111 *Ibid*.

112 *Ibid* at para 55.

113 *Ibid* at para 60; see also para 55.

2. constitutional questions;
3. "true" questions of jurisdiction: "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter";[114]
4. "questions regarding the jurisdictional lines between two or more competing specialized tribunals."[115]

Much like *CUPE*, the majority in *Dunsmuir* broke with the past, but not entirely. For instance, the majority counselled a two-step process for judicial review: first, courts "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question."[116] If no precedent exists, then a court should proceed to applying the standard of review analysis. In so stating, the majority seemed to assume that the new standard of review methodology would yield the same result as the old pragmatic and functional analysis. The court also indicated that the application of the new standard of reasonableness would not undermine decisions that might have withstood the less exacting standard of patent unreasonableness. The court addressed this concern directly when it reiterated that deference is "central to judicial review in administrative law," and affirmed that "[t]he move towards a single reasonableness standard does not pave the way for a more intrusive review by courts."[117]

When applying its new standard of review analysis to the legal issue raised in *Dunsmuir*, the majority proceeded swiftly to a deferential standard of review: the statute contained a full privative clause; the arbitrator was administering a discrete and specialized labour law regime that provided for prompt and final non-judicial remediation:

> Although the adjudicator was appointed on an ad hoc basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the PSLRA can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. … The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.[118]

While *Dunsmuir* engaged a question of law, it was not one of central importance to the legal system, and so the standard of reasonableness applied.

This deferential tenor of *Dunsmuir* might have assuaged the concern that decisions previously sheltered under the standard of patent unreasonableness might henceforth be set aside as unreasonable. But does this mean that the new reasonableness is the same as the old "patent unreasonableness"? That seems unlikely. Yet the court seems determined to change the test without overruling any prior decisions. One way of finessing the dilemma is to imagine that the new technique for evaluating reasonableness will be neither the "somewhat probing" analysis proposed under reasonableness *simpliciter*, nor the "clearly irrational" benchmark of patent unreasonableness, but something qualitatively different.

114 *Ibid* at para 59.
115 *Ibid* at para 61.
116 *Ibid* at para 62.
117 *Ibid* at para 48.
118 *Ibid* at paras 68-69.

The way in which reasonableness is measured is the subject of Chapter 12, Making Sense of Reasonableness, by Sheila Wildeman.

The *Dunsmuir* majority equivocated on the role of *Pushpanathan*'s pragmatic and functional balancing approach, describing it as a kind of backup to the defeasible rule method of the standard of review analysis.[119] It is not clear how these two methodologies can co-exist, or what advantage exists in maintaining both. Over time, the majority of the court quietly jettisoned *Pushpanathan*'s four factors in favour of exclusive reliance on the defeasible rule methodology, though minority and dissenting judgments occasionally attempt to revive the factors in mounting an argument that deference is not warranted in a particular case.[120] One cannot discount the possibility that today's dissent might be tomorrow's majority. In any case, the decision tree in Figure 11.1 illustrates the dominant rendition of *Dunsmuir*, as distilled by majority judgments up to 2017.

The concurring judgment by Binnie J aligns with the majority judgment in most respects, though a close reading suggests a somewhat less deferential posture. Compare his approach to questions of law with that of the majority:

> It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.[121]

Binnie J also foreclosed the application of the standard of review analysis to questions of procedural fairness,[122] although his dictum has not entirely laid the matter to rest. Perhaps the most enduring and notable features of Binnie J's judgment are those passages where he plays the role of Cassandra, cautioning that the majority judgment leaves various issues unresolved, which will eventually come home to roost in the application of the new and improved standard of review analysis. We return to those below.

Deschamps J delivered separate concurring reasons along with Charron and Rothstein JJ. While they share the same concern about the complexity and unwieldiness of existing doctrine, their proposed solution departed significantly from the other six judges:

> By focusing first on "the nature of the question," to use what has become familiar parlance, it will become apparent that all four [*Pushpanathan*] factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.[123]

Deschamps J explained that in the absence of a privative clause (and definitely in the presence of a statutory appeal), the same principles that govern an appeal court hearing an appeal from a lower court should govern judicial review on questions of law, mixed law and

119 *Ibid* at para 64. For other examples of equivocation, see *Nolan v Kerry (Canada) Inc*, 2009 SCC 39, [2009] 2 SCR 678; *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616.

120 See e.g. *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, [2016] 2 SCR 293 [*Capilano Shopping Centres*], McLachlin CJ and Moldaver, Côté, and Brown JJ, dissenting.

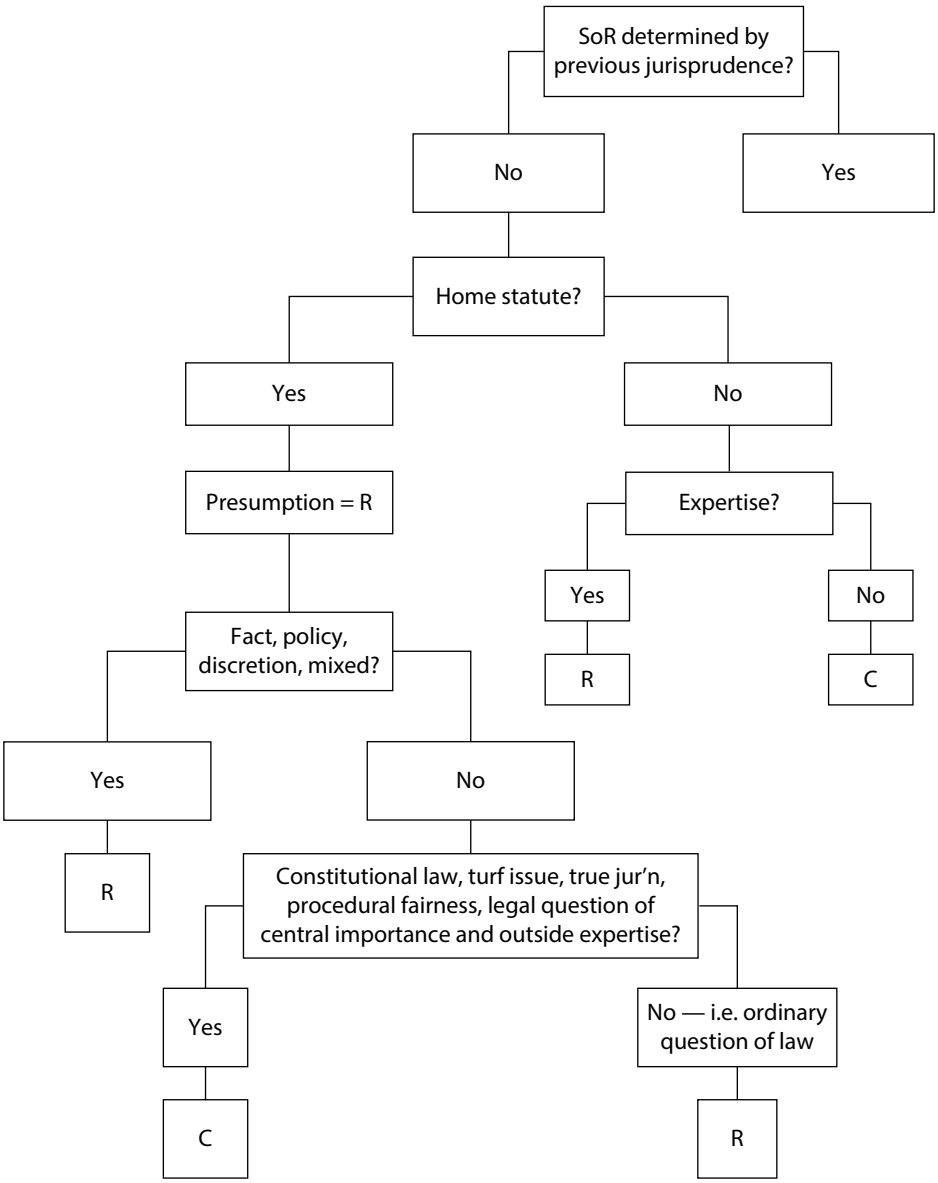
121 *Dunsmuir*, *supra* note 4 at para 128.

122 *Ibid* at para 129.

123 *Ibid* at para 168.

Figure 11.1

Standard of Review Decision tree in *Dunsmuir* (Majority)
SoR = Standard of Review
R = reasonableness (deference)
C = correctness (no deference)



fact, and fact. This would mean no deference on questions of law, and greater deference on questions of mixed law and fact, and questions of fact. She would also extend deference to administrative bodies' exercise of statutory discretion.

In the presence of a privative clause, Deschamps J would counsel deference to questions of law as well, unless they did fall outside the decision-maker's "core expertise." In such cases, the court has a constitutional responsibility "as guardians of the rule of law" to ensure a correct interpretation of the law.[124] Deschamps J explained:

> This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance.[125]

Deschamps J's concurring judgment borrows from various time periods: its insistence that judicial review by a court is not qualitatively different than an appeal from one court to a higher court hearkens back to the pre-*CUPE* period, where the nature of the superior courts' superiority was qualitatively the same in respect of lower courts and "inferior tribunals." Treating the presence or absence of a privative clause as determinative of legislative intent regarding deference is reminiscent of the post-*CUPE*, pre-*Pezim* era. Prioritizing expertise is consistent with the *Pushpanathan* test. Deschamps J's solution to "keeping it simple" is to treat judicial review in the same manner as appellate review by calibrating the standard of review according to the nature of the problem (law, fact, mixed law/fact, discretion). Only in the presence of a privative clause is deference on questions of law warranted and only to the extent of the decision-maker's expertise.

Deschamps J's minority judgment is rarely cited in subsequent jurisprudence. Nevertheless, it is important to revisit its underlying logic when considering how, in practice, the Supreme Court of Canada has applied "reasonableness" to questions of law, questions of mixed law and fact, and questions of fact and discretion.

The court's new standard of review analysis seems refreshingly uncluttered. The choice is simply to defer (reasonableness) or not to defer (correctness) according to the following rule: presume reasonableness where an administrative actor is interpreting or applying a provision of the home statute or closely allied statute, subject to the four enumerated exceptions.

In *Capilano Shopping Centres*, the majority reiterated why a rebuttable presumption in favour of deference advances democratic objectives:

> This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.[126]

The reference to access to justice seems almost ironic. While providing parties with faster and cheaper decision-making may have been a goal of legislators in setting up agencies, boards, and tribunals in the first place, judicial review of those decisions remains slow and

124 *Ibid* at para 171.
125 *Ibid*.
126 *Capilano Shopping Centres*, *supra* note 120 at para 22.

expensive, and the confusion generated by standard of review jurisprudence up to the present only reduces predictability and creates incentives to litigate.

If the defect of the pragmatic and functional test was that it asked the right questions but delivered few determinate answers, the weakness of the new standard of analysis is that it delivers clear answers but at the expense of leaving various conceptual loose ends dangling. In this respect, the two methodologies exemplify the attractions and limitations of functional versus formal analysis.

The remainder of this chapter spins out *Dunsmuir*'s progeny, focusing almost exclusively on Supreme Court of Canada jurisprudence on the choice between correctness and reasonableness as the standard of review. Superficially, it seems simple: it's (almost) all reasonableness, (almost) all the time. But the volatility of standard of review compared to other areas of administrative law makes complacency risky. Abella J has signalled a desire to jettison correctness altogether and apply deference to all decisions by all administrative decision-makers all the time.[127] Another faction of the court seems more intent on moving the jurisprudence in the opposite direction. One can find evidence sprinkled in the case law where one or more of the *Pushpanathan* factors are invoked to justify deviation from deference, but they remain exceptional, ad hoc, and often the minority view—at least for now.

While the *Dunsmuir* court genuinely endeavoured to clarify and streamline standard of review analysis when it delivered its judgment in 2008, seven years later, Slatter JA of the Alberta Court of Appeal still felt constrained to commence his judgment with the following words: "the day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review. Today is not that day."[128]

A. Punting the Problem

Dunsmuir reduced the forms of deference from two (patent unreasonableness, reasonableness *simpliciter*) to one (reasonableness). Justice Binnie was preoccupied with the problem of how a single, invariant standard of deference could manage the diverse range of actors, issues, statutory review provisions and expertise that the pragmatic and functional test previously identified and calibrated according to two standards of deference. He opined that the majority decision simply shifts the problem downstream from the selection of the standard of review to its application in the individual case. He contended that the new reasonableness standard would inevitably devolve into a spectrum of deference, where the assessment of what constituted an (un)reasonable decision would vary according to the four factors that *Pushpanathan* previously used to select between more and less deference.

The majority of the court has resolutely resisted repeated pleas to acknowledge reasonableness as a sliding scale or spectrum, repeating often this dictum from *Khosa*: "reasonableness is a single standard that takes its colour from the context."[129] Over the course of a decade of post-*Dunsmuir* jurisprudence, the court has declined to share the contextual

127 *Wilson v Atomic Energy*, *infra* note 191, Abella J; *Capilano Shopping Centres*, *supra* note 120 (dissent).

128 *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85, 382 DLR (4th) 85 at para 11. In its judgment on appeal from the Alberta Court of Appeal, the SCC optimistically replied, "That day has not come, but it may be approaching": *Capilano Shopping Centres*, *supra* note 120 at para 20.

129 *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59 [*Khosa*].

crayons it uses to colour reasonableness from one case to the next. The court's reticence means that students, lawyers, academics, and lower courts must read between the lines of individual judgments, look for patterns in the case law, and seek guidance from pre-*Dunsmuir* jurisprudence (including the *Pushpanathan* factors) to divine what is (or is not) contextually relevant. The next chapter addresses this central challenge directly.

B. What About the Privative Clause?

Up to and including *CUPE*, the privative clause operated as the requisite legislative signal for deference. Under the pragmatic and functional test, the privative clause was demoted to one among many factors that a reviewing court would consider in determining whether to defer and, if so, how much to defer. In *Dunsmuir*, the privative clause becomes superfluous. The default position is deference irrespective of the presence or absence of a privative clause, there is only a single standard of reasonableness, and the privative clause does not trump the countervailing force of the exceptions to the presumption of deference. So where is the value added by the privative clause? In his concurring judgment, Binnie J delivers a tribute—or perhaps a requiem—for the unique heft of the privative clause:

> The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor among others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. … A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.[130]

Binnie J's insistence on the distinctiveness of privative clauses can be linked to his prediction of the inevitable emergence of a spectrum of deference under the rubric of reasonableness. Thus he asserted that "[a] single standard of 'reasonableness' cannot mean that the degree of deference is unaffected by the existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown."[131] Perhaps this means that the presence of a privative clause should "colour" how reasonableness is applied.

C. What About Statutory Appeals?

Just as the privative clause has become superfluous as a legislative signal in favour of deference, the statutory appeal is no longer an impediment to deference. Before *Pezim* and *Southam*, the availability of a statutory appeal to the courts signalled that no curial deference was owed to the decision under appeal, and according to *Pushpanathan*, it was a relevant factor in choosing between the three standards of review. *Dunsmuir* did not explicitly address the significance of the statutory appeal, and in *Khosa*, Binnie J unhelpfully remarked that "[w]hile privative clauses deter judicial intervention, a statutory right of appeal may be

130 *Dunsmuir*, *supra* note 4 at para 143.

131 *Ibid*. In *Khosa*, *supra* note 129 at para 55, Binnie J reiterates that a "privative clause is an important indicator of legislative intent" to "deter judicial intervention."

at ease with it, depending on its terms."[132] Binnie J did not elaborate on the kind of terms that would put a statutory right of appeal more or less at ease with judicial intervention.

In general, the court continued to rule that that administrative decisions subject to statutory appeal to a court still attracted deference.[133] In *Capilano Shopping Centres*,[134] the Alberta Court of Appeal held that a statutory right of appeal should be another exception to the presumption of reasonableness. A five-judge majority of the Supreme Court of Canada swiftly rejected the proposition: "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies—as the Court of Appeal did in this case—would go against strong jurisprudence from this court."[135] The majority then listed six post-*Dunsmuir* cases where the court applied a reasonableness standard of review in the presence of a statutory appeal provision.[136]

The four dissenting judges objected to framing the issue as the recognition of a new category of correctness review. Rather, they contended that "[i]n every case, a court must determine what the appropriate standard of review is for *this* question by *this* decision-maker."[137] Taking up Binnie J's unfinished business, the dissent set out to explain why the particular appeal provision before it sent a strong signal in favour of correctness review. First, the statutory appeal was limited to questions of law and jurisdiction "of sufficient importance to merit an appeal." The limited right of appeal and the criterion of importance "[indicated] that the legislature intended these questions to be reviewed by the Court of Queen's Bench for correctness."[138] Secondly, where a statutory appeal is allowed and the court sets aside the original decision, it must send it back to the original decision-maker to re-hear and decide in accordance with the opinion or direction by the court "on the question of law or the question of jurisdiction." In the dissent's view, this militated in favour of correctness: "the fundamental premise of [the provision] is that pure questions of law and jurisdiction appealed to the Court of Queen's Bench do lend themselves to one specific, particular result because the Court of Queen's Bench is bound to provide *direction* on these pure questions of law and jurisdiction and the board is prohibited from reaching a different result on those questions when the matter is remitted to it.[139]

D. Whatever Happened to Jurisdiction?

Recall that the "jurisdictional question" arose as a judicial escape hatch from the strictures of privative clauses: a decision, determination, or order that exceeded the jurisdictional boundaries conferred by statute was a nullity and, therefore, not a genuine decision, determination,

132 *Ibid* at para 55.

133 The lone exception was *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 SCR 161 at paras 34-40, where the statutory provision governing appeal from the tribunal directly to the Federal Court of Appeal stated that the decision was appealable as of right on a question of law as if "it were a judgment of the Federal Court." The Supreme Court ruled that this signalled a correctness standard, because that is the standard applicable to an ordinary appeal from the Federal Court to the Federal Court of Appeal.

134 *Supra* note 128.

135 *Ibid* at para 28.

136 *Ibid* at para 29.

137 *Ibid* at para 71 (dissent).

138 *Ibid* at para 77 (dissent).

139 *Ibid* at para 79 (dissent).

or order insulated from judicial review. But the demotion of privative clauses cast into question the raison d'être of its foil, the jurisdictional question. After *Southam*, a court could both justify deference in the absence of a privative clause and justify correctness scrutiny in the presence of a privative clause. Eventually, the jurisdictional question lost its formal, conceptual moorings and became merely a label affixed to the outcome reached by a judicial balancing of the four factors summarized in *Pushpanathan*. Serious attention to formal attributes of jurisdiction (authority over subject matter, parties, or remedy) virtually disappeared.

As applied by subsequent courts, *Dunsmuir* seemed to relinquish the *Pushpanathan* balancing test, but the judgment also revived the formal idea of jurisdiction as a boundary-drawing concept capable of rebutting a presumption of deference. The majority also invoked the dictum in *CUPE* that urged the courts to be sparing in their resort to the formal claim of jurisdiction. Thus far, the post-*Dunsmuir* Supreme Court of Canada seems committed to exercising restraint in labelling an issue as jurisdictional and thereby subject to the stricter standard of correctness. The best proof lies in *Dunsmuir* itself. Without expending much effort, the court could have transformed the question "Does the statute authorize the adjudicator to inquire into the existence of cause for dismissal?" into "Does the adjudicator have jurisdiction to inquire into the existence of cause for dismissal?" Yet, the court refrained from even posing the question in jurisdictional terms. The adjudicator had jurisdiction over the parties (the employer and employee) and over the subject matter (discharge, suspension, or other financial penalty), and that sufficed.[140]

Later, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*,[141] the court directly confronted the post-*Dunsmuir* endurance of jurisdictional questions in relation to the standard of review analysis.

Writing for six judges, Rothstein J ventured that "the time [had] come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction [existed] and [whether it was] necessary to identifying the appropriate standard of review."[142] The core of Rothstein J's proposal resides in the admission that decades of administrative law jurisprudence had left him "unable to provide a definition of what might constitute a true question of jurisdiction."[143] Preserving a concept that is theoretically compelling but practically unworkable and even superfluous seems only to invite the type of arcane and indeterminate legal wrangling that *Dunsmuir* sought to avoid. Because the Supreme Court of Canada had already cast the cloak of constitutional protection over judicial review (thereby foreclosing any literal application of a privative clause), and *Dunsmuir* had identified other criteria for applying the correctness standard, extinguishing the category of jurisdictional question jeopardized neither the resilience of judicial review nor

140 See also *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160 [*Smith*]. In *Northrop Grumman Overseas Services Corp v Canada (Attorney General)*, 2009 SCC 50, [2009] 3 SCR 309 at para 10, the court avoided engaging the question by noting that the parties all accepted that earlier case law remained authoritative in imposing a standard of correctness. Because the earlier jurisprudence determined the standard of review in "a satisfactory manner," the court was relieved of the task of conducting a fresh standard of review analysis.

141 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Information and Privacy Commissioner*].

142 *Ibid* at para 34.

143 *Ibid* at para 42.

correctness scrutiny. Technically though, the majority does not deal the fatal blow to jurisdiction as a basis of correctness view, concluding instead that jurisdictional questions are exceptional and none had come before it since *Dunsmuir*.[144]

A sympathetic reading of the majority judgment might suggest that the other post-*Dunsmuir* grounds for correctness review really amount to exemplars of situations typically regarded as "jurisdictional" in pre-*Dunsmuir* case law. In a jurisprudence chiefly notable for its lack of predictability, the correctness standard was most consistently applied to issues of procedural fairness, constitutionality, the "jurisdictional lines between competing specialized tribunals," and questions of law elevated to "central importance to the legal system as a whole and … outside the adjudicator's expertise."[145] One could argue that the work done by "jurisdiction" pre-*Dunsmuir* is performed post-*Dunsmuir* by these exceptions to the default presumption of *Dunsmuir* reasonableness, thereby rendering "jurisdiction" itself otiose.

Cromwell J emphatically disagreed with the majority on the fate of jurisdiction, warning that the position espoused by Rothstein J threatened to "undermine the foundation of judicial review of administrative action."[146] As Rothstein J notes, however, Cromwell J's objection fails to take into account the bases for application of a correctness standard apart from the jurisdictional question.

Cromwell J's version of the standard of review analysis tempers the inclination toward reasonableness with "a more thorough examination of legislative intent when a plausible argument is advanced that a particular provision falls outside the 'presumption' of reasonableness review and into the 'exceptional' category of correctness review."[147] Cromwell J does not actually conduct a thorough examination of legislative intent in the case, or indicate what a plausible argument should contain, confining himself to the conclusory statement that the legislature did not intend a correctness standard to apply because "the power to extend time is granted in broad terms in the context of a detailed and highly specialized statutory scheme which it is the Commissioner's duty to administer and under which he is required to exercise many broadly granted discretions."[148] This quick concession seems curious, because Cromwell J could have identified the fact that the interpretation of a statutory provision about timelines essentially concerns the process of investigation and adjudication, and the court has consistently applied a correctness standard to matters of procedural fairness.

Binnie J (Deschamps J concurring) staked out a conciliatory middle position between Rothstein J and Cromwell J. He agreed with the latter that the concept of jurisdiction is "fundamental," but endorsed Rothstein J's initiative "to euthanize the issue" on account of its practical disutility.[149] Binnie J's middle ground consists of two propositions. The first is a reiteration of his prediction that reasonableness will entail a spectrum of intensity of scrutiny, with the implication that the application of a reasonableness review may, in appropriate cases, look very similar to correctness review. The second is a revision of the "question of

144 See also *Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615 at para 39.
145 *Ibid* at para 30.
146 *Ibid* at para 92.
147 *Ibid* at para 99.
148 *Ibid* at para 101.
149 *Ibid* at para 88.

central importance to the legal system as a whole" exception to deference. Here, Binnie J offered a broader and more generic exception for questions of law that "raise matters of legal importance beyond administrative aspects of the statutory scheme under review" and which do not lie "within the core function and expertise of the decision maker."[150] If adopted, Binnie J's reformulation would appear to enlarge the scope of questions of law subject to the correctness standard of review.

The boundary metaphor that underwrites jurisdiction is at once irresistible and impracticable. Perhaps it is no coincidence that the vocabulary of jurisdiction feels most natural when invoked in respect of entities that also happen to be geographically bounded, such as municipalities, provinces, and states. This makes all the more notable the 2012 judgment in *Catalyst Paper Corp v North Cowichan (District)*,[151] which concerned a municipal tax by-law. The court resolutely avoided the term "jurisdiction," or its close cousin (*ultra*) *vires*, and couched its analysis of the by-law within the standard of review framework of reasonableness. The court did the same for Manitoba Law Society rules, but retained the *ultra vires* framework (with its implicit correctness standard) for evaluating the legality of subordinate legislation enacted by the Ontario Cabinet to regulate the sale of generic drugs.[152] The rationale for the disparity is not apparent, yet the court still avoided using the term "jurisdiction" in the latter case.

Yet it seems that reports of jurisdiction's death as a ground of correctness review may be premature. Like a true B-movie zombie, it lumbered back to life in the dissenting judgment in *Quebec (Attorney General) v Guérin*.[153] The case concerned a framework agreement between the province of Quebec and the provincial federation of physicians regulating, *inter alia*, fees that physicians could charge the government. The agreement also empowered the two negotiating parties to recognize (according to stipulated criteria) laboratories eligible to bill the government for certain fees under the framework agreement. The parties recognized the appellant's laboratory but did not make the recognition retroactive (which they could do on an exceptional basis). The appellant submitted a dispute to the arbitrator of the framework agreement alleging that his clinic should have received retroactive recogntion, and that it was entitled to bill for the contested fee. Section 54 of the *Health Insurance Act*[154] provided that "[a] dispute resulting from the interpretation or application of an agreement [like the Framework Agreement] is submitted to a council of arbitration, to the exclusion of any court of civil jurisdiction."[155]

The arbitrator ruled that he did not have authority to rule on whether the appellant's laboratory should have been recognized retroactively, because recognition of laboratories was reserved to the negotiating parties in the framework agreement and, in any case, the

150 *Ibid* at para 89.
151 2012 SCC 2, [2012] 1 SCR 5 [*Catalyst*].
152 Compare *Green v Law Society of Manitoba*, 2017 SCC 20; *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 SCR 810.
153 2017 SCC 42 [*Guérin*].
154 CQLR, c A-29.
155 *Guérin*, supra note 152 at para 6.

appellant did not have standing as an individual to submit the dispute to arbitration.[156] At issue was whether certain radiology clinics fell within the terms of the agreement such that they could claim a certain type of fee. The majority of the court regarded both the issue of arbitrability and standing under s 54 as subject to reasonableness, and found the arbitrator's decision on each issue to be reasonable. Brown and Rowe JJ (dissenting) agreed that the issue of standing attracted deference, but insisted that the question of whether the arbitrator could rule on the recognition of the laboratory was jurisdictional because it concerned the authority of the arbitrator to decide a matter submitted to it.

> Our colleagues Wagner and Gascon JJ, however, say that jurisdiction was not at issue here; rather, they view the matter as one of arbitrability. It is true that an issue is not arbitrable before a tribunal that has no jurisdiction to hear it. That said, arbitrability is distinct from jurisdiction and standing. Jurisdiction is about who has competence to decide what issues. Standing is about who can participate in the proceedings. Arbitrability, however, is akin to justiciability, in that it goes to whether the issue is capable of being considered legally and determined by the application of legal principles and techniques (by, in this case, the arbitrator). In our respectful view, the majority risks undermining the coherence of the analytical structure in administrative law by mischaracterizing questions of jurisdiction and standing as questions of arbitrability. The question of whether the arbitrator had the authority to decide on Dr. Guérin's matter was, as we say and as this Court's own jurisprudence demonstrates, clearly jurisdictional.[157]

It is too early to predict whether the dissent will succeed in reviving jurisdiction as a ground of correctness review, or whether their judgment is rather more like a rear guard action in a lost battle.

E. Whatever Happened to Patent Unreasonableness?

Pity the legislators: long ago, they gave up trying to refine the privative clause in order to persuade judges that when they told the courts to "get out and stay out," they really meant it. If the privative clause was an exercise in communicating legislative intent about the role of the courts, suffice to say that the message was, if not lost, then reformulated in translation. The Supreme Court of Canada rationalized this through the constitutionalization of judicial review, and a negotiation between the rule of law and an idea of parliamentary sovereignty counterpoised against the rule of law.

Sometime after *Southam*, a few legislators switched tactics and decided instead to direct the courts on the legislature's intended standard of review by explicitly stating whether a reviewing court should apply correctness, unreasonableness *simpliciter*, or patent unreasonableness. For example, the BC *Administrative Tribunals Act*[158] (ATA) itemizes grounds of judicial review applicable to the tribunals subject to the ATA and matches each ground with a standard of review. In the case of judicial review of discretion, the ATA also lists factors

156 *Ibid* at para 3.

157 *Ibid* at para 70. Note that even if the arbitrator erred by refusing to arbitrate the issue, the outcome of the case does not change if the appellant had no standing to bring the issue to arbitration in the first place.

158 SBC 2004, c 45 [ATA].

relevant to determining whether discretion was exercised in a patently unreasonable way.[159] In Ontario, the *Human Rights Code* contains a privative clause stipulating that "a decision of the [Human Rights] Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable."[160]

And then *Dunsmuir* came along, and out went patent unreasonableness.

The court in *Khosa* acknowledged the predicament for parties dealing with statutes that incorporate the now obsolete common law standard of "patent unreasonableness":

> Generally speaking, most if not all judicial review statutes are drafted against the background of the common law of judicial review. Even the more comprehensive among them, such as the British Columbia *Administrative Tribunals Act*, can only sensibly be interpreted in the common law context because, for example, it provides in s 58(2)(a) that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with *unless it is patently unreasonable*." The expression "patently unreasonable" did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of indicia of patent unreasonableness are given in s 58(3). Despite *Dunsmuir*, "patent unreasonableness" will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law. That said, of course, the legislature in s 58 was and is directing the BC courts to afford administrators a high degree of deference on issues of fact, and effect must be given to this clearly expressed legislative intention.[161]

How have courts interpreted statutory standards of "patent unreasonableness" post-*Dunsmuir*?

In *British Columbia (Workers' Compensation Board) v Figliola*,[162] the Supreme Court of Canada considered whether the BC Human Rights Tribunal exercised its discretion in a patently unreasonable fashion when it decided to adjudicate a *Human Rights Code* complaint that had already been rejected by a review officer of the BC Workers' Compensation Board. The court was not required to interpret the term "patently unreasonable" post-*Dunsmuir*, because the ATA already defined it according to the traditional indicia of abuse of

159 If a tribunal's enabling statute has a privative clause, the standard of review is patent unreasonableness for questions of law and fact or the exercise of discretion for all matters over which "the tribunal has exclusive jurisdiction" (ATA, s 58(1)). Common law rules of natural justice and procedural fairness must be decided "having regard to whether, in all of the circumstances, the tribunal acted fairly" (ATA, s 58(2)(b)), and a standard of correctness applies to "all other matters." Where the enabling statute has no privative clause, findings of fact are reviewable on the basis of no evidence or unreasonableness, questions of law are reviewable on correctness, the exercise of discretion is subject to a standard of patent unreasonableness, and procedural fairness is decided "having regard to whether, in all of the circumstances," the tribunal acted fairly (ATA, s 59(5)).

160 *Human Rights Code*, s 45.8.

161 *Khosa, supra* note 129 at para 19.

162 2011 SCC 52, [2011] 3 SCR 422 [*Figliola*].

discretion.[163] In *Shaw v Phipps*,[164] the Ontario Divisional Court held that "patently unreasonable" in the Ontario *Human Rights Code* should be interpreted against the legislative intent at the time of enactment. The Divisional Court reasoned that the Ontario legislature's intent was to confer the highest level of deference available under general principles of administrative law on the Human Rights Tribunal. In 2006, that standard was patent unreasonableness. The Supreme Court of Canada subsequently declared the highest level of deference available under general principles of administrative law to be reasonableness. Therefore, according the highest degree of deference to the tribunal's determination of liability and remedy post-*Dunsmuir* meant respecting those "questions within the specialized expertise of the Tribunal" unless "they are not rationally supported—in other words, they are unreasonable."[165]

F. What Is a Question of Central Importance to the Legal System as a Whole (and Outside the Decision-Maker's Area of Expertise)?

This category of correctness review contains two elements that figured prominently in pre-*Dunsmuir* jurisprudence. The first is expertise, which was the guiding principle animating *Pushpanathan*. The second is consistency, which is both a virtue of good administration and valorized by the rule of law. In *Dunsmuir*, questions of jurisdiction and constitutionality might be understood as matters that lie outside the expertise of administrative decision-makers. Issues concerning the jurisdictional boundaries between different administrative tribunals seem more ambiguously tied to expertise, but also link back to the allocation of questions of true jurisdiction to the correctness standard. Questions of "central importance to the legal system as a whole" are assigned to correctness review only if they are also "outside the specialized area of expertise of the administrative decision-maker."[166] The *Dunsmuir* majority is also concerned about precedent: "Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers."[167]

The particular wording of this exception appears to come from the pre-*Dunsmuir* case of *Toronto v CUPE*.[168] In that case, the Supreme Court of Canada considered the standard of review applicable to the relitigation of a criminal conviction in the course of a grievance arbitration. LeBel J concurred with the majority's assessment that the question concerned common law doctrines that went to the administration of justice. He agreed that the appropriate standard of review was correctness, because the issue concerned "a question of law

163 ATA, s 59(4) defines a patently unreasonable exercise of discretion as one where the discretion
(a) is exercised arbitrarily or in bad faith,
(b) is exercised for an improper purpose,
(c) is based entirely or predominantly on irrelevant factors, or
(d) fails to take statutory requirements into account.

164 2010 ONSC 3884.

165 *Ibid* at para 42.

166 *Dunsmuir*, *supra* note 4 at para 60.

167 *Ibid*.

168 *Supra* note 102.

that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise."[169]

By relegating the only explicit mention of expertise to a subclause of one exception, the standard of review approach articulated in *Dunsmuir* arguably decentres expertise as relevant to the choice of standard of review. The court routinely mentions delegation and expertise as part of the overall rationale for curial deference, but it is unclear whether demonstrated lack of expertise is capable of rebutting a presumption of reasonableness, or useful in calibrating how reasonableness is applied. In its post-*Dunsmuir* jurisprudence, the court has largely ducked the issue of consistency as a practical matter without actually disputing it as a virtue of legality.

Prior to *CUPE*, the privative clause was a necessary signal that the legislator regarded the administrative actor as expert. Post-*Southam*, other factors could also demonstrate expertise, with or without a privative clause. One reading of *Dunsmuir* is that it does not disavow the relevance of expertise; rather, it simply deems administrative decision-makers as expert in doing whatever is involved in administering the statutory scheme by virtue of their existence (unless one of the exceptions applies). This posture contrasts with the view expressed by former US appellate judge (and scholar) Richard Posner, whose critique of poor-quality decision-making by US immigration adjudicators commenced with the declaration, "deference is earned; it is not a birthright."[170] The Supreme Court of Canada comes close to affirming deference as a birthright in the following passage from *Capilano Shopping Centres*:

> Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer … . Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, *expertise is something that inheres in a tribunal itself as an institution*.[171]

This deemed expertise reaches its zenith (or nadir, depending on one's perspective) in the Federal Court of Appeal decision in *Tran*.[172] A minister's delegate (Canada Border Services Agency (CBSA) officer) had discretion to refer a permanent resident to an inadmissibility hearing on grounds of serious criminality, which is defined under immigration law according to, *inter alia*, the length of the penal sentence potentially or actually imposed on the offender. The complications in Mr Tran's case were that he was given a conditional rather than carceral sentence, and the minimum potential sentence was raised by amendments to the *Criminal Code* between the time he was charged and his trial. Counsel for Mr Tran made lengthy legal submissions to the minister's delegate about whether a conditional sentence should be counted as the equivalent of a carceral sentence, and the significance of retrospectivity in criminal sentencing. In the reasons for his decision to refer Mr Tran to an inadmissibility hearing, the minister's delegate, "I have reviewed counsel's submissions carefully and thoroughly, and given thought to each relevant point. Many are legal arguments that do

169 *Ibid* at para 62.

170 *Kadia v Gonzales*, 501 F (3d) 817 (7th Cir 2007) at 821.

171 *Capilano Shopping Centres*, *supra* note 120 at para 33 (emphasis added).

172 *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237, 392 DLR (4th) 351.

not fall within the scope of my duties in this matter."[173] The minister's delegate then proceeded by ignoring Mr Tran's legal arguments, which had the same practical effect as considering and rejecting them. Despite the delegate's own admission that he lacked competence to address questions of statutory interpretation relating to penal law, the Federal Court and the Federal Court of Appeal extended deference to his decision. It seems difficult to impute to the minister's delegate an expertise in statutory interpretation that he expressly disavowed. The judgments in *Tran* thus bring to the fore the questions of what it means for expertise to inhere in an institution as opposed to those who exercise power in the name of the institution, and whether expertise actually matters at all.

In a unanimous judgment, the Supreme Court of Canada allowed Mr Tran's appeal.[174] But to the surprise and disappointment of observers, the Supreme Court of Canada did not even advert to the standard of review issues that the Federal Court of Appeal called on the court to address, much less resolve them. The court confined its reasoning exclusively to statutory interpretation of the contested provisions.

The other prong of this exception to deference is that the question of law be of "central importance to the legal system as a whole." Over 40 years ago, Peter Hogg made the case for administrative decision-makers' lack of expertise in making determinations of this nature:

> The very qualities which make the Agency well-suited to determine questions within its area of specialization may lead it to overlook or underestimate general values which are fundamental to the legal order as a whole. The generalist court is ideally suited to check the specialist Agency at the point where these general values are threatened.[175]

The *Dunsmuir* majority's requirement that the question be of "central importance" to the legal system and outside the expertise of the decision-maker caused Binnie J to worry that these qualifications would unleash needless and distracting debate in the lower courts. In his view, deference on questions of law should be interpreted narrowly or, to put it the other way, the exception to deference on questions of law should be interpreted broadly to cover all general questions of law.[176]

It is difficult to identify what the post-*Dunsmuir* court considers to be a question of central importance to the legal system because it has rejected virtually every attempt to designate one. In *Pushpanathan*, the Immigration and Refugee Board was interpreting art 1F(c) of the *UN Convention Relating to the Status of Refugees*. The court determined that a correctness standard of review applied to that interpretation, using the four "pragmatic and functional" factors identified in that judgment. Although it could not be said that the *UN Convention* as such was outside the expertise of refugee adjudicators, art 1F(c) required identification of the "purposes and principles of the United Nations," an issue that Immigration and Refugee Board members would have little occasion and no training or experience to address. And, as noted earlier, the court in *Toronto v CUPE* identified abuse of process as a question of law of central importance to the legal system as a whole and beyond the expertise of a labour adjudicator.

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173 Subsection 44(1) Decision of CBSA Officer, on file with author.

174 *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50.

175 Peter W Hogg, "Judicial Review in Canada: How Much Do We Need It?" (1974) 26 Admin L Rev 337 at 344.

176 *Alberta Information and Privacy Commissioner*, *supra* note 141 at para 89.

The court has only invoked the exception post-*Dunsmuir* on two occasions. In *Alberta (Information and Privacy Commissioner) v University of Calgary*,[177] the Alberta Information and Privacy Commissioner exercised statutory authority to issue a Notice to Produce Records to University of Calgary as a public employer subject to a constructive dismissal claim. Section 56(3) of the *Freedom of Information and Protection of Privacy Act*[178] requires a public body to disclose records to the commissioner "[d]espite … any privilege of the law of evidence" applied to records over which the body asserts solicitor–client privilege. Like *Toronto v CUPE*, the issue concerned a general litigation doctrine. The majority identified several factors in favour of characterizing both the interpretation and application of s 56(3) as questions of central importance to the legal system as a whole and outside the commissioner's expertise:[179] solicitor–client privilege is "fundamental to the proper functioning of our legal system";[180] it has acquired constitutional dimensions as a principle of fundamental justice and client privacy;[181] the interpretation of the statutory language has "potentially wide implications on other statutes";[182] and, finally, the commissioner has "no particular expertise with respect to solicitor–client expertise, an issue which has been traditionally adjudicated by the courts."[183]

The second case is *Mouvement laïque québécois v Saguenay (City)*,[184] in which the Quebec Human Rights Tribunal determined that a by-law permitting recitation of a religious prayer prior to council meetings infringed the Quebec Charter's freedom of conscience and religion.

After quoting with approval the dictum from *Canada (Attorney General) v Mowat*[185] that "not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise," the court asserted that the issue in the case at bar crossed the threshold:

> In my opinion, in the context of this appeal, this court's decisions, more specifically *Dunsmuir*, *Mowat* and *Rogers*, to which I have referred, support a separate application of the standard of correctness to the question of law concerning the scope of the state's duty of neutrality that flows from freedom of conscience and religion. I find that the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable.[186]

Reading *Dunsmuir*, *Mowat*, and *Rogers*[187] does not immediately illuminate how the outcome in *Saguenay* was undeniable. Perhaps the explanation lies in the historic reluctance of the court to defer to human rights tribunals in the interpretation of substantive anti-

177 2016 SCC 53, [2016] 2 SCR 555 [*AIPC v University of Calgary*].
178 RSA 2000, c F-25.
179 *AIPC v University of Calgary*, *supra* note 177 at para 22.
180 *Ibid* at para 20 (quoting *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 9).
181 *Ibid* at para 20.
182 *Ibid*.
183 *Ibid* at para 22.
184 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*].
185 2009 FCA 309, [2010] 4 FCR 579 [*Mowat*].
186 *Saguenay, supra* note 184 at para 51.
187 *Infra* note 190.

discrimination provisions, which lie close to the heart of the judicial task of interpreting s 15 of the Charter.[188] Indeed, it is noteworthy that in *Saguenay*[189] and *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*,[190] a separate rationale for correctness was that the relevant legislation provided the courts with concurrent jurisdiction at first instance over the contested legal question. Where tribunals perform a task similar or identical to a task courts understand as a core judicial function, courts seem less inclined to defer.

One motive for adopting a correctness standard on certain questions of law is to promote consistency. Conflicting interpretations of the same rule give the appearance of arbitrariness and undermine public confidence in the legal system. Some judges regard the fact of inconsistency in the interpretation of a given statutory provision as a reason to treat it as a question of central importance to the legal system as a whole, while others treat inconsistency as an independent basis for correctness review.

The Supreme Court of Canada directly addressed the issue of inconsistency in 1993, after *CUPE* but before *Pushpanathan*. *Domtar*[191] concerned the disparate interpretation of a common phrase by two administrative bodies constituted under different statutes. The court rejected the assertion that the precedential value of resolving inconsistency within or between tribunals constituted an independent basis for adopting a correctness standard of review, where deference would otherwise be warranted. The court conceded that judicial intervention would be justified if the divergent decisions created an operational conflict, whereby compliance with one order would necessitate breach of the other. A significant concern for the court in *Domtar* was the risk that real or apparent inconsistencies within or between tribunal decisions might become a pretext for undermining fidelity to the principles underlying curial deference. The court also adverted to internal mechanisms available to tribunals to encourage consistency, and downplayed the virtues of consistency in relation to other important values served by deference. In *Domtar*, the reach of the court's dictum was limited only by the possibility of direct operational conflict.

In *Mowat*, the Federal Court of Appeal was presented with conflicting interpretations of the same statutory provision by different panels of the same tribunal and, subsequently, by different Federal Court judges on judicial review. The Federal Court of Appeal described the problem as follows:

> The question has not been answered consistently by the Tribunal and is the subject of diverse opinions in the Federal Court. It comes before the court for the first time. It is difficult, if not impossible, to conclude that the answer (either yes or no) can be said to fall within a range of possible acceptable outcomes. There is much to be said for the argument that where there are two conflicting lines of authority interpreting the same statutory provision, even if each on its own could be found to be reasonable, it would not be reasonable for a court to uphold both.[192]

188 Note that in *Mowat*, where the court applied a reasonableness standard *de jure* (if not *de facto*), the issue concerned expenses, not the interpretation of a substantive anti-discrimination provision.

189 *Saguenay, supra* note 184 at paras 46, 51.

190 2012 SCC 35, [2012] 2 SCR 283 at paras 14-20 [*Rogers*].

191 *Domtar*, *supra* note 31.

192 *Mowat, supra* note 185 at para 45 (FCA).

The values of certainty and consistency for the affected parties and the public at large led the Court of Appeal to characterize the question of whether a human rights tribunal can order the losing party to pay the legal costs of the complainant as a "general question of law of central importance to the legal system as a whole and one that is outside the specialized area of the Tribunal's expertise."[193] It set aside the Human Rights Tribunal's affirmative response to the question as incorrect.

The Supreme Court of Canada in *Mowat* suppressed the issue of conflicting decisions and did not advert to it. It decided that the Human Rights Tribunal's inclusion of legal costs as "expenses" was unreasonable. The judgment had the convenient effect of ruling out one of only two possible interpretations of the statutory provision. The court thus provided definitive guidance to subsequent decision-makers without adverting to the inconsistency.

In *McLean v British Columbia (Securities Commission)*,[194] the court rejected an argument for correctness based on potential inconsistency in the interpretation of similarly worded statutory limitation periods between provincial securities commissions. The majority observed that "[i]f there is a problem with such a hypothetical outcome, it is a function of our Constitution's federalist structure—not the administrative law standards of review."[195]

The court addressed inconsistency again in *Wilson v Atomic Energy of Canada Ltd*.[196] The issue was whether the *Canada Labour Code* permitted dismissals only for cause. The Federal Court of Appeal depicted this as a matter of long-standing disagreement among labour adjudicators and, on that basis, made a principled case for intervening on a correctness standard to resolve the disputed point, declaring that "we have to act as a tie-breaker."[197] The Federal Court of Appeal's decision was endorsed by two dissenting judges at the Supreme Court of Canada, who insisted that as long as there is even "one conflicting but reasonable decision, its very existence undermines the rule of law."[198] The dissent's rather extravagant rhetoric about the menace of inconsistency might have been spurred by the uncontested evidence that among thousands of decisions on unjust dismissal rendered in the previous 35 years, only eight diverged from the overwhelming consensus that dismissal must be for cause.[199] The Federal Court of Appeal and the dissenters on the Supreme Court of Canada ruled that this inconsistency warranted a correctness standard of review and, furthermore, that the interpretation adopted in the eight decisions was the correct one. Abella J, speaking for the majority on this point, dismissed the concern about inconsistency by acknowledging that "[i]t is true that a handful of adjudicators have taken a different approach to the interpretation of the *Code*, but … this does not justify deviating from a reasonableness standard."[200]

How a court should address conflicting jurisprudence remains a vexing and unanswered question. Does or should it matter how frequent or long-standing the inconsistency, or what the stakes are for those affected? How does inconsistency convert a question that is not

193 *Ibid* at para 47.
194 [2013] 3 SCR 895, 2013 SCC 67.
195 *Ibid* at para 11.
196 2016 SCC 29, [2016] 1 SCR 770 [*Wilson*].
197 *Wilson v Atomic Energy of Canada Ltd*, 2015 FCA 17, [2015] 4 FCR 467 at para 55.
198 *Wilson*, *supra* note 196 at para 89, Moldaver, Côté and Brown JJ, dissenting.
199 *Wilson v Atomic Energy of Canada Ltd*, Factum of the Appellant in the Supreme Court of Canada at para 46, online: <http://www.scc-csc.ca/WebDocuments-DocumentsWeb/36354/FM010_Appellant_Joseph-Wilson.pdf>.
200 *Wilson*, *supra* note 196 at para 17.

otherwise of central importance to the legal system into one that is? If you were a member of a tribunal, would you prefer that it be left to your peers to address divergent interpretations through institutional mechanisms within the administrative agency, or would you rather that the courts resolve the matter definitively by applying a correctness standard? Does it matter whether such institutional mechanisms exist and whether they have been deployed? Would it be legitimate to pre-empt future conflict by asserting a standard of correctness the first time the interpretation of a legal provision is contested? If not, when does it become appropriate to do so?

G. Reasonable Charter Violations

Dunsmuir preserves correctness review for constitutional questions, and this seems like an easy case: The Constitution is the supreme law of Canada, constitutional decisions reverberate widely through the legal system, judges possess expertise in constitutional adjudication, the Charter protects fundamental rights, and adjudication by independent judges ensures protection of individual rights from majoritarian tyranny.

At the same time, discretionary decisions attract deference, ostensibly because there is, *ex hypothesi*, no uniquely correct answer to how discretion should be exercised. As Evan Fox-Decent and Alexander Pless explain in Chapter 13, The Charter and Administrative Law Part II: Substantive Review, the court has vacillated in how to manage this tension. Currently, a wobbly majority endorses deference to Charter determinations conducted in the course of discretionary decisions. This significantly retracts the scope of correctness review for constitutional questions.

In *Doré v Barreau du Québec*,[201] the Supreme Court of Canada addressed the discretionary decision by the Barreau to sanction Doré for an intemperate letter he wrote to a judge. Doré argued that doing so infringed his expressive rights under the Charter. The court rebranded Doré's freedom of expression under s 2(a) as a Charter "value," and then explained why deference should apply to judicial review of a discretionary infringement of this "value," stating, "when Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference."[202] The majority explained that courts should recognize "the distinct advantage that administrative bodies have in applying the Charter to a specific set of facts and in the context of their enabling legislation."[203] Rather than adapt the s 1 *Oakes* test to the exercise of a case-specific discretion (the approach taken in the earlier case of *Multani*),[204] the court proposed a "proportionality" analysis that balances "the severity of the interference of the *Charter* protection with the statutory objectives."[205] If the outcome of that balancing "falls within a range of possible, acceptable outcomes," then it merits deference. The concluding declaration of the court is that "[i]f, in exercising its statutory discretion, the decision-maker

201 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. But see also *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613, where three of seven judges effectively applied the *Oakes* (*R v Oakes*, [1986] 1 SCR 103) test to the exercise of discretion affecting freedom of religion.

202 *Doré*, *supra* note 201 at para 36.

203 *Ibid* at para 48.

204 *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

205 *Doré, supra* note 201 at para 56.

has properly balanced the relevant *Charter* values with the statutory objectives, the decision will be found to be reasonable."[206]

Abella J, the author of *Doré* and its chief proponent, insists that her administrative proportionality approach is compatible with the *Oakes* test, and will ensure a comparable level of rights (or "values") protection delivered via a methodology more appropriate to discretionary decision-making. These are crucial and contestable claims. Unlike the procedural fairness doctrine, standard of review analysis historically has been indifferent to the nature of the interests or the impact of a decision on the affected party.[207] The fact that an important interest was affected or that a decision would have a profound impact on a party did not strengthen the case for a correctness standard of review. However, correctness review for constitutional questions comes closest to tacitly doing this, insofar as part of the justification for more stringent judicial scrutiny turns on the weight we attach to Charter rights. If *Doré*'s administrative law proportionality test does not ascribe Charter rights (or "values") the unique weight that a more traditional *Oakes* test does, then rights protection will differ according to whether the Charter is infringed via a rule or via discretion.

We live in an era where most governments take advice from government lawyers in drafting legislation in order to avoid flagrant unconstitutionality. It is also the case that many contemporary statutes look increasingly "skeletal." What goes on the bones of the statute is fleshed out through regulatory authority delegated to the governor in council or through expansive and broad grants of statutory discretion to administrative decision-makers (including ministers). If Charter issues are increasingly likely to emerge in the exercise of discretion rather than in the text of a legal rule, the scope and intensity of judicial oversight of Charter-impacting discretion will have implications for the level of rights protection within the Canadian legal order.[208]

VII. SPIN-OFFS

A. Segmentation

Where a judicial review application raises several discrete issues, reviewing courts have sometimes calibrated the standard of review separately for each issue. Segmentation arises whenever one link in a decision chain attracts a different standard of review from other links in the chain. *Dunsmuir* offers relief from the complexity of this process by expanding the range of

206 *Ibid* at para 58.

207 For a pre-*Dunsmuir* argument in favour of taking impact into account, see Lorne Sossin and Colleen Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007) 57 UTLJ 581.

208 See Audrey Macklin, "Charter Right or Charter Lite? Administrative Discretion and the Charter" (2014) 67 SCLR (2d) 561. In *Gehl v Canada (Attorney General)*, 2017 ONCA 319, the Ontario Court of Appeal split on the question of how to sequence judicial review of Charter-impacting discretion. The case concerned the discretionary refusal by the Registrar for Aboriginal Affairs to register Dr Gehl as a status Indian because she could not prove the status of her paternal grandfather. Applying *Doré*, Sharpe JA ruled that the Registrar's discretion was exercised unreasonably in light of s 15 of the Charter. Lauwers and Miller JJA ruled that the Charter should not be considered, even in an administrative law analysis, unless and until non-Charter bases of review were exhausted.

decisional steps to which deference will presumptively apply, but the problem remains where one or more elements of the decision attracts a standard of review of correctness.

In *Dunsmuir*, Binnie J described segmentation in the following terms:

> Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the court's view of Charter principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers… . In the jargon of the judicial review bar, this is known as "segmentation."[209]

Unfortunately, neither Binnie J nor his colleagues say anything further in *Dunsmuir* (or in subsequent cases) about the dilemmas posed by segmentation, or how to resolve them. As a practical matter, however, the problem has diminished owing to the decline in instances where the court considers a correctness standard of review appropriate. It may reappear.

B. Standard of Review and Procedural Fairness

The *Dunsmuir* majority says nothing about the standard of review for questions of procedural fairness, but Binnie J plugs that hole by confirming that a standard of correctness will continue to apply, stating, "On such matters … the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests, or privileges adversely dealt with by an unjust process."[210] In a brief obiter in *Khela*, a unanimous court reiterated that "the standard for determining whether the decision maker complied with the duty of procedural fairness will continue to be 'correctness.'"[211] Another way of stating this principle is to deny that standard of review is apposite to questions of procedural fairness. The only metric is whether the proceedings were conducted fairly.[212]

Despite the Supreme Court of Canada's cursory rejection of deference on questions of procedural fairness, a lively discussion persists among academic commentators and some lower court judges about the desirability of extending the logic that underpins deference to matters of procedure.[213]

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209 *Dunsmuir*, *supra* note 4 at para 142.

210 *Ibid* at para 129.

211 *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 79.

212 See e.g. *Gismondi v Ontario (Human Rights Commission)* (2003), 50 Admin LR (3d) 302, [2003] OJ No 419 (QL) (Div Ct).

213 See e.g. *Bergeron v Canada (Attorney General)*, 2015 FCA 160; Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40:1 Queen's LJ 213; John Evans, "Fair's Fair: Judging Administrative Procedures" (2015) 28 CJALP 111.

1. Reasoning About Reasons

Reasons straddle procedure and substance. As Kate Glover explains in Chapter 5, The Principles and Practices of Procedural Fairness, *Baker* recognized that a common law duty to give reasons is a component of fairness. Reasons serve a number of purposes, not the least of which is to communicate that the decision-maker has genuinely heard and considered the evidence and arguments presented.

Reasons also disclose the findings of fact, interpretations of law, applications of law to fact, and exercises of discretion that are the substance of the decision. Reasons contain the evidence of the reasonableness (or correctness, as the case may be) of those exercises of statutory authority. As you will see in the next chapter, measuring the substantive reasonableness of a decision post-*Dunsmuir* includes assessing the quality of the reasoning process, as measured against criteria of justification, transparency, and intelligibility.

There is obvious potential for overlap between assessing the formal adequacy of reasons as a matter of procedural fairness and evaluating the substantive content of reasons as a matter of merits review. Framing the ground of review in terms of procedure rather than substance potentially invites a greater degree of judicial intervention via the correctness standard. The more a court demands of reasons in order to satisfy the procedural duty of fairness, the greater the scope for expansive and intrusive judicial review.

Finding a consistent "break point" between the form of reasons and the content of reasons proved challenging for lower courts, but the Supreme Court of Canada abruptly terminated the debate in its decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*.[214] Abella J, writing for the court, stated: "I do not see *Dunsmuir* as standing for the proposition that the 'adequacy' of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses—one for the reasons and a separate one for the result."[215] Later, she explicitly minimized the procedural aspect to a mere formal requirement:

> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" … . It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.[216]

A scenario not identified in the judgment arises where the reasons are deficient because they fail to address a particular issue. So, there are some reasons for the ultimate decision, but effectively no reasons at all with respect to the particular issue. The problem surfaced in *Alberta Information and Privacy Commissioner*. The statute required the commissioner (or delegated adjudicator) to complete an inquiry within 90 days of receiving a complaint, unless the commissioner (or delegate) notified the parties that the period was being extended

214 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*].
215 *Ibid* at para 14.
216 *Ibid* at paras 21-22.

to an estimated date. The issue was whether the inquiry automatically terminated after 90 days if no notice was given, or whether the commissioner (or delegate) could notify the parties of the extension after expiry of the 90 days. As described above, the court ruled that the timelines issue was not jurisdictional, and so the standard of review was, in principle, reasonableness.[217] But applying reasonableness to the decision was hampered by the fact that the timelines issue was not raised before the adjudicator and was first raised on judicial review. The fact that the adjudicator finally notified the parties 22 months after the complaint was filed was taken as conveying an implicit decision about the timelines issue.

Quoting from David Dyzenhaus, the court reiterated that the concept of "'deference as respect' requires of the courts 'not submission but a respectful attention to the reasons offered or which could be offered in support of a decision.'"[218] The court observed that since no reasons were offered on the timelines issue, there was nothing to which respectful attention could be given:

> However, the direction that a reviewing court should give respectful attention to the reasons "which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision-maker could have decided as it did, the court must not interfere.[219]

A court might embark on its own search for reasons that "could be offered" in circumstances where the original decision-maker did not address the issue because it was not raised, or there was no duty to give reasons, or where "only limited reasons" were required.[220] In contrast to *Newfoundland Nurses*, which some interpret as an invitation to reviewing courts to rummage around in the record for additional indicia of reasonableness (even where reasons are provided),[221] the court in *Alberta Information and Privacy Commissioners* was more circumspect:

> I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result." Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision." On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided.[222]

217 *Alberta Information and Privacy Commissioner, supra* note 141. Arguably, timelines are an issue of procedural fairness, but none of the judgments advert to this possibility.

218 *Alberta Information and Privacy Commissioner*, *supra* note 141 at para 52.

219 *Ibid* at para 53.

220 *Ibid* at para 54. Note that Dyzenhaus urged courts to consider reasons that "could be offered" prior to *Baker*, and was presumably addressing situations where the statute did not require reasons and no common law duty existed to furnish reasons.

221 *Newfoundland Nurses, supra* note 214 at para 15.

222 *Alberta Information and Privacy Commissioner*, *supra* note 141 at para 54 (citations omitted).

But what happens where no reasons are provided on a given issue in circumstances where the decision-maker could have, but did not, supply reasons? In some cases, like *Alberta Information and Privacy Commissioners*, the tribunal may have other precedents that address the issue. In other cases, it might be appropriate to remit a decision back to the original decision-maker to supply the missing reasons. But if these options are unavailable, what does it mean for a court to defer to a decision on an issue where reasons could have been provided but were not? In *Agraira*,[223] the court deferred to an "implied" interpretation of "national interest" under s 34(2) of the *Immigration and Refugee Protection Act* by the minister of public safety. In *McLean*, the court deferred to an "implied" interpretation by the BC Securities Commission of a statutory limitation period. And in *Tran*, discussed earlier, the Federal Court of Appeal deferred to an "implied" interpretation of IRPA criminality provisions by a CBSA officer with no legal expertise, who expressly stated in his reasons that he would not—and did not—consider relevant legal arguments about the interpretation of the statutory provision he was applying.

In effect, the court's approach to "implied" reasons seeks to retrofit the outcome reached by the decision-maker with judicially created reasons. It is difficult to reconcile this exercise with the idea of deference as respect. When courts step in and supply reasons that a decision-maker could have but did not provide, they are not demonstrating respect for the decision-maker: they are doing the job that the decision-maker was supposed to do. More worrying is the pervrse incentive that this practice creates for administrative decision-makers: instead of crafting thorough reasons that risk being set aside as "unreasonable," why not write the bare minimum to satisfy *Newfoundland Nurses*' low standard, and let a reviewing court fill in any gaps? This tactic would seem inimical to the "culture of justification" that administrative law aspires to promote in the administrative state. Were courts to demand more from decision-makers to satisfy their reason-giving requirement, it is possible that decision-makers would be motivated to provide more careful reasons in order to demonstrate the reasonableness of their outcomes.

C. Standard of Review and Internal Appeals

Some administrative regimes provide for an internal appeal from a first-level decision-maker to an internal appellate body. Should the same principles applicable to judicial review or statutory appeal apply to an internal administrative appeal?

The issue was litigated in *Huruglica v Canada (Citizenship and Immigration)*.[224] In 2013, the Refugee Appeal Division (RAD) was introduced to hear appeals from first-level refugee determinations by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. The RAD was constituted and governed by provisions of the *Immigration and Refugee Protection Act*. The expectation was that most appeals would be conducted in writing, though oral hearings were possible. The statutory provisions, *inter alia*, authorized the RAD to confirm the RPD decision, set it aside and "substitute a determination that, in its opinion, should have been made," or remit to the RPD with directions if it is of the opinion that "the decision of the Refugee Protection Division is wrong in law, in fact, or in mixed law and fact."[225]

223 *Canada (Public Safety and Emergency Preparedness) v Agraira*, 2011 FCA 103 [*Agraira*]

224 2016 FCA 93, [2016] 4 FCR 157, aff'g, 2014 FC 799, [2014] 4 FCR 811.

225 See *Immigration and Refugee Protection Act*, ss 110-111, quoted in *Huruglica* (FCA), *supra* note 224 at para 25.

One of the first questions addressed by the RAD was the scope of its mandate. As stated by the Federal Court of Appeal, the "controversy … can be more accurately described as a disagreement over whether to import either the standard from a judicial review of an administrative action (*Dunsmuir*) or an appellate court's review of a lower court decision (*Housen*)[226] into the RAD's review of an RPD decision."[227] The Federal Court of Appeal concluded that it was a mistake to analogize an internal appeal to either a judicial review or an appeal from lower to higher court:

> The principles which guided and shaped the role of courts on judicial review of decisions made by administrative decision-makers (as set out in *Dunsmuir* at paras. 27-33) have no application here. Indeed, the role and organization of various levels of administrative decision-makers do not put into play the tension between the legislative intent to confer jurisdiction on administrative decision-makers and the constitutional imperative of preserving the rule of law. [I]t would also be inappropriate to import the considerations set out in *Housen*, since the adoption of the high level of deference afforded by appellate courts of law to lower courts of law on questions of fact and mixed fact and law was mainly guided by judicial policy.[228]

The important insight for present purposes is that the nature of the relationship between two administrative bodies does not generate the same institutional concerns that animate curial deference by courts toward administrative decision-makers. Rather than import common law techniques for resolving the question, the Federal Court of Appeal instructed the RAD to look to its statute for the answer: "the textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent in respect of the relevant provisions of the *IRPA* and the role of the RAD."[229] In other words, internal appeal bodies should just do what their statute tells them to do. This may or may not resemble what courts do on judicial review or on appeal from a lower court.

D. Are Ministers Different?

Tacitly or explicitly, courts are often inclined to defer to Cabinet ministers across the span of administrative law, and so the routine application of a standard of review of reasonableness seems unproblematic. The reasons for this posture are various: ministers sit at the apex of the executive (the Cabinet), and may attract deference because of their "prominence in the administrative food chain."[230] A minister, who is almost always a politician, is more able to "respond to the political, economic and social concerns of the moment"[231] that are relevant to making broad policy decisions under law. Ministers, because of their leadership of a government department, may be deemed expert in all aspects of their portfolio by virtue of the position or because of their access to advisers with actual expertise. Finally, because virtually all ministers are elected officials, their actions carry a democratic

226 *Housen v Nikolaisen*, 2002 SCC 33.
227 *Huruglica* (FCA), *supra* note 224 at para 44.
228 *Ibid* at paras 47-48.
229 *Ibid* at para 46.
230 *Dunsmuir*, *supra* note 4 at para 145, Binnie J.
231 *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at 755; *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, [2001] 3 SCR 209 at para 239.

imprimatur that courts both lack and respect. *Suresh v Canada (Minister of Citizenship and Immigration)*[232] challenged, *inter alia*, ministerial discretion to deport non-citizen terror suspects to countries where they could face torture. A unanimous court stated that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove."[233]

The foregoing may seem relevant only to how the court actually applies the deferential reasonableness to ministerial actions, not to the appropriateness of deference as such. But in at least two circumstances, one might question whether the presumption of deference should apply to ministers.

The first case arises where ministers interpret statutes that they are responsible for implementing. This was the scenario in *Agraira*, where the court not only applied a deferential standard of review, but applied it to "implied" non-existent reasons for an interpretation of "national interest." In an earlier Federal Court of Appeal judgment that *Agraira* did not consider, *Minister of Fisheries and Oceans v David Suzuki Foundation*,[234] the Federal Court of Appeal ruled that ministers' interpretations of their own statutes did not attract deference in a non-adjudicatory context.[235]

The Federal Court of Appeal reached back for support past *Pushpanathan*, beyond *CUPE*, all the way to the Glorious Revolution of 1688, the *Bill of Rights* of 1689, and the *Act of Settlement* of 1701. The Court of Appeal invoked these as the historic touchstones for the principles of parliamentary sovereignty, the separation of powers, and the rule of law: "the Crown and its officials would thereafter be bound by Parliament's laws as interpreted by the independent common law courts."[236] After tracking the evolution of substantive review forward to *Dunsmuir*, the Court of Appeal emphasized that *Dunsmuir's* presumption of deference was directed at independent adjudicative bodies, whose core and explicitly delegated tasks include statutory interpretation, which in turn approximates the judicial function. The Court of Appeal vigorously resisted the expansion of *Dunsmuir*'s presumption to all administrative actors who administer a federal statute:

> The Minister thus seeks to establish a new constitutional paradigm under which the Executive's interpretation of Parliament's laws would prevail insofar as such interpretation is not unreasonable. This harks back to the time before the *Bill of Rights* of 1689 where the Crown reserved the right to interpret and apply Parliament's laws to suit its own policy objectives. It would take a very explicit grant of authority from Parliament in order for this court to reach such a far-reaching conclusion.
>
> The issues in this appeal concern the interpretation of a statute by a minister who is not acting as an adjudicator and who thus has no implicit power to decide questions of law. Of course, the Minister must take a view on what the statute means in order to act. But this is not

232 2002 SCC 1, [2002] 1 SCR 3.

233 *Dunsmuir*, *supra* note 4 at para 145; see also *Retired Judges*, *supra* note 85 at para 18, Bastarache J, dissenting: "Furthermore, empowering the Minister, as opposed to an apolitical figure such as the Chief Justice of the province [to appoint arbitrators], suggests a legislative intent that political accountability also play a role in policing appointments and the integrity of hospitals interest arbitration."

234 2012 FCA 40, 427 NR 110 [*David Suzuki*].

235 The Federal Court of Appeal in *Agraira* also ruled that the interpretation of "national interest" was subject to a standard of review of correctness.

236 *David Suzuki*, *supra* note 234 at para 73.

> the same as having a power delegated by Parliament to decide questions of law. The presumption of deference resulting from *Dunsmuir* … does not extend to these circumstances.[237]

The Supreme Court of Canada has not taken up the Federal Court of Appeal's challenge. A similar issue arises with respect to ministerial determinations of whether their own actions violate the Charter. In *Lake v Canada (Minister of Justice)*,[238] the court deferred to the Minister of Justice's determination that surrender of a fugitive for extradition would not violate the fugitive's ss 6 and 7 rights under the Charter. The court regarded the discretionary power to order extradition as "largely a political decision, not a legal one" and "a fact-driven inquiry."[239] Deferring to a minister's assessment of the constitutionality of his or her own conduct risks eroding individual rights protection, bearing in mind that the democratic legitimacy that ministers enjoy entails responsiveness to majoritarian will. The judgment in *Lake* preceded *Doré*, but seems consistent with it. Many, if not most, individualized exercises of discretion can easily be characterized as "fact-driven." The claim that a decision is political rather than legal is conclusory and unhelpful, insofar as many "political" decisions have a legal dimension. Moreover, it is precisely because the violation of individual rights may be politically expedient that the Charter places legal limits on the exercise of governmental power.[240]

E. Aboriginal Law and Standard of Review

In Chapter 3, Realizing Aboriginal Administrative Law, Janna Promislow and Naiomi Metallic survey the intersections between Aboriginal and administrative law. Emerging case law on the Specific Claims Tribunal (SCT) and the duty to consult provide occasions for attending to the role of standard of review. As with all such intersections between public law and the claims of Indigenous Peoples, an underlying question concerns whether the conventional doctrinal tools used to ensure accountability for the exercise of executive power over the individual are really transposable to the relationship between Canada and Indigenous Peoples.

The SCT was established by the federal government in 2008 to deal with historic Indigenous claims about the Crown's duties and failures in relation to setting aside of reserve lands, and the management of assets and moneys from reserve lands. Prior to the establishment of the SCT, claims were decided by the minister without any mechanism for adjudication. The SCT is the key venue for adjudicating breaches of fiduciary duty in Crown–Indigenous relations, especially in relation to historical claims. The members of the SCT are drawn from a roster of Superior Court judges. In the first case to reach the Federal Court of Appeal, *Kitselas First Nation v The Queen*,[241] the court ruled that the standard of review applicable to SCT interpretation of fiduciary law was correctness. The Court of Appeal reasoned that superior courts have concurrent jurisdiction over fiduciary law, and the members of the SCT are, in fact, superior judges. Relying on the Supreme Court of Canada judgment in *Rogers*,[242] the Court of Appeal reasoned that it would not make sense to defer to the SCT's

237 *Ibid* at paras 98-99. The Court of Appeal then proceeds to apply *Pushpanathan*'s four factors, and concludes that correctness is the appropriate standard of review: paras 101-105.

238 2008 SCC 23, [2008] 1 SCR 761 [*Lake*].

239 *Ibid* at paras 37-38.

240 See generally, "Charter Right or Charter Lite," *supra* note 208.

241 2014 FCA 150, 460 NR 185.

242 *Ibid* at para 33.

interpretation of fiduciary law when an appellate court would apply a correctness standard to the same issue arising from a trial court. Even though this was the first case to come before a reviewing court, the Court of Appeal also invoked the importance of consistency, stating, "Inconsistency on such fundamental matters would be unseemly and give rise to significant practical consequences."[243]

Although ordinary courts do address fiduciary law in Crown-Indigenous relations, the SCT is unique in its legislative mandate and its focus on historic claims about the setting aside of reserve lands. In litigation before ordinary courts, limitation periods sharply curtail the ability to bring historic claims forward, and often bar them. The SCT operates within a framework where addressing historic claims is neither marginal nor exceptional, but is central to its specific mandate. Interestingly, in the first appeal from the SCT to reach the Supreme Court of Canada, *Canada v Williams Lake Indian Band*,[244] all parties (including the government) agreed that the appropriate standard of review was reasonableness, notwithstanding the Federal Court of Appeal's endorsement of correctness on questions of law. The parties disagreed, of course, on the reasonableness of the SCT's resolution of the contested questions of law, mixed law and fact, and fact.

Chapter 3 sets out the contours of the duty to consult. In the pre-*Dunsmuir* case of *Haida Nation v British Columbia (Minister of Forests)*,[245] the Supreme Court of Canada applied extant principles that allocated the standard of review according to the type of question at stake: on factual assessments, including those relevant to the existence or extent of the duty to consult, courts should defer; to the extent that the legal elements of the duty to consult can be extricated from the factual questions, the standard would be correctness, but, if not, the standard would be reasonableness; on the actual implementation of consultation, the standard would be reasonableness; "the government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty [to consult]."[246] Note that the adequacy of consultation is measured according to reasonableness, whereas the court's stance on procedural fairness is correctness. What explanation lies behind the apparent disparity in scrutiny of the duty of fairness owed by a state actor to a legal subject and the duty of the state to consult Indigenous People?

Another question concerns the relationship between fulfillment of the duty to consult and the ultimate decision that is the subject of consultation. In *Gitxaala Nation v Canada*,[247] the Federal Court of Appeal determined that the standard of review applicable to a Cabinet order approving the Northern Gateway pipeline project was reasonableness.[248] That order was the culmination of a very lengthy and complex process that engaged, *inter alia*, a duty to consult with Indigenous Peoples. The Court of Appeal ruled that reasonableness was also the appropriate standard for reviewing the adequacy of consultation. But the sequence of

243 *Ibid* at para 34.

244 2016 FCA 63, leave to appeal to the SCC granted, 2016 CanLII 68008.

245 2004 SCC 73, [2004] 3 SCR 511. The standard of review in respect of the duty to consult has not been revised by the Supreme Court of Canada in light of *Dunsmuir*. See *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 48.

246 *Ibid* at para 62.

247 2016 FCA 187.

248 *Ibid* at para 145: "The standard of review for decisions such as this—discretionary decisions founded upon the widest considerations of policy and public interest—is reasonableness."

the Court of Appeal's judgment was unusual: it began with the reasonableness of Cabinet's order. The Court of Appeal ruled that the Cabinet order approving the pipeline was reasonable. Then the Court of Appeal proceeded to consider the duty to consult on a deferential standard of reasonableness, and concluded that Cabinet had not fulfilled its duty to consult Indigenous People. In administrative law jurisprudence, courts typically refrain from commenting on the substantive merits of an outcome produced by a process that fails to meet the requirements of procedural fairness. A court usually begins with the procedural grounds of review and, if the process was defective, the court orders a remedy, which typically involves setting aside the decision and remitting it back to the original decision-maker. The Federal Court of Appeal in *Gitxaala* proceeded by finding an outcome reasonable even though the process leading to it was not.

VIII. REVIEW OF STANDARD OF REVIEW: PAST AS PROLOGUE

The tensions lying at the heart of jurisprudence about the standard of review have not changed and will not go away. In its recent jurisprudence, the majority of the Supreme Court of Canada has staked out a position that, in principle, inclines toward deference. It has told and retold the story about why and when courts ought to defer to the decisions of administrative decision-makers. Each major iteration reveals shifts in emphasis, additional nuances, glosses on past recitations, and attempts to reconcile, distinguish, or conceal apparent anomalies. On rare occasions, we get a new plot twist: from two standards of review to three, then back to two (but not the same two); from the formalism of "preliminary or collateral question" to multifactor balancing to a defeasible rule (or maybe not). Lower court resistance to current trends and dissenting voices on the court may yet provoke another change of course.

The job of discerning the appropriate standard of review became simpler after *Dunsmuir*, and for this students and practitioners of administrative law should feel relieved. But they should also attend to the prediction of Binnie J in *Dunsmuir*. By streamlining the standard of review analysis and winnowing deference down to a single standard of reasonableness, the court has not resolved the challenge of operationalizing deference in all its multifarious applications. Rather, it has shifted the task downstream to the next stage of judicial review—namely, the application of correctness or (more commonly) reasonableness review to actual decisions. And once in the land of reasonableness, all depends on "context." But since the court has declined thus far to articulate what counts as context, students, lawyers, scholars, and lower court judges must search for clues where they can find them. Pre-*Dunsmuir* jurisprudence is one place to look. And so, the conclusion of this chapter is a prologue to the next, where the real action unfolds.

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